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Pages 271 to 350

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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F.C.C. 72-825

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Amendment
REQUIREMENTS FOR PENDING CABLE TELEVISION
APPLICATIONS AND PLEADINGS

SEPTEMBER 14, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), JOHNSON, R. REX LEE, WILEY AND HOOKS, ISSUED THE FOLLOWING PUBLIC NOTICE:

AMENDMENT REQUIREMENTS FOR PENDING CABLE TELEVISION APPLICATIONS AND PLEADINGS

In its *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, FCC 72-530, 37 Fed. Reg. 13848 (1972), the Commission adopted a number of amendments to the cable television rules.

Several applicants for certificates of compliance have asked whether applications filed prior to the effective date of the amendments to the rules (July 14, 1972) must be amended to conform to the changes in the rules, and if so, to what extent.

The following revisions of the cable television rules appearing in the *Reconsideration*, *supra.*, will be applied retroactively to March 31, 1972:

Sections:

76.3	76.54(a), (c), & (note)
76.5(a) (note)	76.57(a)(2)
76.7(a) & (h)	76.59(a)(5)
76.11(d)	76.59(b)(1)
76.13(a)(2), (6), & (9)	76.59(d)(1) & (2)
76.13(b)(1), (3), (5), (6), & (8)	76.61(a)(3)
	76.61(b)(1)
76.13(c)(1), (2), (4), & (6)	76.61(e)(1) & (2)
76.25	76.251(a)(2)
76.31(a)(3), (4), & (proviso)	76.251(c)
76.51(b)	76.605(a)(5) & (12)
76.53	76.609

The following revisions of the cable television rules appearing in the *Reconsideration*, *supra.*, will be applied to applications and pleadings filed on or after July 14, 1972:

109-010—72——1

Sections:

76.7(b)	76.16(a), (b), & (c)
76.7(c)(3)	76.18
76.13(a)(7)	76.20(a) & (b)
76.13(b)(2) & (7)	76.27
76.13(c)(5)	

Sections 76.13(a)(4), (b)(4), & (c)(3) were amended to include the requirement that a certificate applicant explain how he plans to comply with the origination cablecasting requirements of Section 76.201. No showing of compliance with section 76.201 is required pending termination of the stay of the mandatory origination cablecasting requirement. In all other respects, Sections 76.13(a)(4), (b)(4), & (c)(3) will be applied retroactively to March 31, 1972.

Petitions for interpretative rulings involving Sections 76.93 and 76.99 of the Rules, as amended, have been filed. The Commission expects to rule on these petitions in the near future, and, thus, these sections have not been made subject on this notice.

Action by the Commission September 13, 1972. Commissioners Burch (Chairman), Johnson, H. Rex Lee, Wiley and Hooks.

F.C.C. 72-831

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ATS MOBILE TELEPHONE, INC.	Docket No. 19500 File No. 4034-C2-P-70
PAUL D. JONES & JON N. FARRINGTON D/B/A COUNCIL BLUFFS MOBILEPHONE	Docket No. 19501 File No. 2675-C2-P-70
CURTIN CALL COMMUNICATIONS, INC. For Construction Permits to Establish New Facilities in the Domestic Public Land Mobile Service at Council Bluffs, Iowa	Docket No. 19502 File No. 4032-C2-P-70
and In Re Applications of ATS MOBILE TELEPHONE, INC.	File Nos. 4033-C2-P-(4)-70 7983-C2-P-70
PAUL D. JONES & JON N. FARRINGTON D/B/A COUNCIL BLUFFS MOBILEPHONE	File No. 2674-C2-P-70
CURTIN CALL COMMUNICATIONS, INC. For Construction Permits to Establish New Facilities in the Domestic Public Land Mobile Service at Omaha, Nebraska and Council Bluffs, Iowa	File No. 3743-C2-P-71
CURTIN CALL COMMUNICATIONS, INC. For Construction Permits to Establish New Facilities in the Domestic Public Land Mobile Radio Service at Wausau, and Eau Claire, Wisconsin	File Nos. 6063-C2-P-70 6801-C2-P-70 6975-C2-P-70
PAUL D. JONES, D/B/A ANSWER ALL OF GRAND ISLAND, ASSIGNOR, AND CHARLES P. ODEN, D/B/A ODEN COMMUNICATIONS CO., ASSIGNEE For Consent to Assignment of License of Station KLF552 and Construction Permit of Station KSV931 at Grand Island, Nebraska	File No. 2239-C2-AP/AL-(2)-72
In Re Petitions for the Institution of Revocation Proceedings Against ATS MOBILE TELEPHONE, INC., PERMITTEE OF STATION KMB512 AND KQZ745, OMAHA, NEBR.	File Nos. 7275-C2-ML-70, 5209-L-70

CURTIN CALL COMMUNICATIONS, INC., LICENSEE OF STATIONS KLF478, KSD318, AND KQZ785, MADISON, WIS.	File Nos. 6525–C2–AL–(3)–70 1713–C2–L–69 7288–C2–L–70 751–C2–R–69
LICENSEE OF STATION KRS630 AT LACROSSE, WIS.	File No. 1811–C2–L–71
PERMITTEE OF STATION KSV988 AT EAU CLAIRE, WIS.	File No. 6800–C2–P–70
PERMITTEE OF STATION KSV989 AT FOND DU LAC, WIS.	File No. 6799–C2–P–70
PERMITTEE OF STATION KSV995 AT JANESVILLE, WIS.	File No. 7519–C2–P–70
LICENSEE OF STATION KFQ940 AT CLAYTON, MO.	File No. 2735–C2–ML–70

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. Before the Commission for consideration in the captioned proceeding are: a Petition for Partial Reconsideration filed by ATS Mobile Telephone, Inc. ("ATS") on July 3, 1972; a Joint Opposition to the Petition for Partial Reconsideration filed on August 11, 1972 by Curtin Call Communications, Inc. ("Curtin Call") and Paul D. Jones and Jon N. Farrington d/b/a Council Bluffs Mobilephone, Inc. ("Mobilephone"); and a Reply to the Joint Opposition filed by ATS on August 31, 1972. Partial reconsideration is sought of our Memorandum Opinion and Order released June 1, 1972 (FCC 72–420–, 35 FCC 2d 443). Simultaneously, with the filing of its Petition for Partial Reconsideration ATS filed a motion for Partial Stay of our Memorandum Opinion and Order of June 1, 1972 pending partial reconsideration; and a Joint Opposition to the Motion for Partial Stay was filed on July 18, 1972 by Curtin Call and Mobilephone.

2. The ATS Petition for Partial Reconsideration requests that this Commission set aside only those parts for our Memorandum Opinion and Order of June 1, which granted construction permits to Curtin Call and Mobilephone.

The partial grant of the ATS application would be left undisturbed. ATS challenges the grants to Curtin Call and Mobilephone on essentially the same grounds as it did in its various petitions to deny all the Curtin Call and Mobilephone applications. The principal arguments made by ATS are that the Curtin Call application, purportedly to serve Council Bluffs, is an "end-run maneuver" of the Nebraska State Railway Commission (which had denied the Curtin Call principals a certificate to provide mobile radiotelephone service in Omaha) and the Nebraska Supreme Court (which had affirmed the Nebraska Commission). ATS contends that "the aim and intent" of the Curtin Call principals "is to provide service to the populous Omaha area *instead of* Council Bluffs" and that this raises a serious question as to whether the Curtin Call application which proposes service only to

the Council Bluffs area contains "serious misrepresentations to this Commission" (ATS Pet. for Partial Reconsid., pp. 6–7; emphasis supplied.) ATS relies upon the alleged testimony of Curtin Call's principal William Curtin in a hearing on his application before the Nebraska Commission that Omaha was "more or less" his home; that he has had business interests there for many years; and that he would prefer to locate his radio transmitter in Omaha rather than Council Bluffs because,

> Technically speaking, there are six ridges, high rises of land in Omaha, and its a great advantage to locate in Omaha, land heightwise, than it is in Council Bluffs, because locating in Council Bluffs you would get shadows undoubtedly . . . [with] pockets of no reception in the Omaha area. . . . The best site is in Omaha. (ATS Pet. for Part. Reconsid., p. 7)

The ATS petition goes on to state, "Curtin also recognized that a State agency may not allow people to go across their state lines and pick a site for a transmitter, and transmit into the State . . . without a certificate from the State [footnote omitted.] (ATS Pet. for Partial Reconsid., pp. 7–8.)

3. ATS attributes the same "end-run" theory to Messrs. Jones and Farrington, the principals of Mobilephone, who as the "key principals" in Radio-Fone, Inc., had applied to the Nebraska State Railway Commission for a certificate for radio common carrier facilities at Omaha, which application had been denied. In the Nebraska hearing, ATS argues, Jones established that the intent of the Radio-Fone principals was to provide service to Omaha where Mr. Jones "already has an existing telephone answering service," that he also stated an intention to devote full-time to its operations; and that the telephone answering service would act as dispatcher of the radio operation, under management of Jones' neice (ATS Petit. for Part. Reconsid., p. 8). All this is said to demonstrate a lack of candor in representations made to this Commission, going to the character qualifications of both the Curtin Call and Mobilephone principals to be radio licensees of this Commission. While ATS concedes that this Commission gave "some weight" to the Nebraska Commission's decisions denying the Curtin and Radio-Fone applications at Omaha, "it has ignored the full import of those decisions and improperly failed to deal with the serious questions of motivation and misrepresentation raised by ATS" (Footnote omitted.) (ATS Petit. for Part. Reconsid., pp. 8–9.) ATS contends that a full evidentiary hearing is warranted not only on the issue of mispresentation, but on the question of whether Curtin Call and Mobilephone have demonstrated a need for their proposed service.

4. ATS contends that the showing of need by both Curtin Call and Mobilephone is inadequate in that it does not meet the criteria established in either the Commission's application form (Item 52, FCC Form 401) or in *Long Island Paging*, 30 FCC 2d 405 (Review Board); *aff'd.*, 32 FCC 2d 235 (1971), particularly in light of the ATS contention that it can meet all existing and potential demands for service in the Council Bluffs area. ATS further contends that Mobilephone and Curtin Call have failed to show that the presently existing facilities of ATS cannot satisfy current demands for new service and, consequently a grant of their applications would result in wasteful

duplication of common carrier facilities and fragmentation of the Omaha-Council Bluffs market.

5. The next contention of ATS is that this Commission has improperly "rewritten" the ATS application for a new two-way radiotelephone station at Council Bluffs (FCC File No. 4035–C2–P–72) to treat it as part of a single application at Omaha, Nebraska, and has improperly denied that application in part, without articulating the rationale for the denial, except for a conclusionary remark that the public interest would be served by treatment of the multiple ATS applications as a single application. ATS maintains that since the Commission did not consider the ATS application for Council Bluffs on its own merits, Section 21.29 of the Commission Rules, which requires the rejection of partial grants within twenty days, is inapplicable.[1] ATS maintains, in addition, that it is financially qualified to construct and operate the Council Bluffs two-way facility, that the estimated costs for the facility are approximately $6,200, which ATS can easily meet.

6. The next contention of ATS is that the grant of authority to Mobilephone and Curtin Call to operate conditionally pending the outcome of the comparative hearing for the 158.70 MHz one-way signalling channel in Council Bluffs, was "improper and extremely prejudicial to ATS' Ashbacker rights."[2] (ATS Petit. for Partial Reconsid., p. 15). Despite the fact that ATS was given the option, which it has exercised, to join in the temporary operation, ATS still contends that it would not receive an impartial comparative hearing; and that there is no public benefit to be derived, because toll-free telephone service is available between Council Bluffs and Omaha, and Council Bluffs mobile radio customers can therefore access existing Omaha paging facilities without paying a toll charge.

7. ATS further maintains that the Commission should have dismissed the Curtin Call and Mobilephone applications when those applicants proposed a sharing agreement for permanent operation on the one-way signalling channel. ATS contends that such an arrangement constituted a "major amendment" to their applications, and should have been considered as new applications, subject to the provisions of Section 21.28(b) and 21.30(b) of the Commission's rules, and dismissed because of untimeliness.

8. Finally, ATS faults the Commission's June 1, Memorandum Opinion and Order on the ground that it improperly failed to give adequate consideration to the public issues raised by the various ATS petitions to revoke licenses or deny applications of Mobilephone or Curtin Call in places other than Council Bluffs or Omaha. ATS maintains that its sole intent was to raise legitimate public interest issues in those petitions rather than harass, deter, or block potential legitimate access. (ATS Petit. for Partial Reconsid., p. 19). ATS relies upon our decision in *Airsignal International, Inc.*, 17 FCC 2d 919, in support of its claim of standing, and reiterates its allegations of trafficking regarding the Clayton, Missouri and Grand Island, Nebraska application, specifically noting that the funding for the Council Bluffs opera-

[1] The ATS Petition for Partial Reconsideration of our June 1, Memorandum Opinion and Order was filed on July 3, 1972, thirty-two days after its release.

[2] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

tion is to some extent, at least, dependent upon the funds derived from the assignment approved by this Commission in Grand Island.[3]

9. Mobilephone and Curtin Call filed a Joint Opposition to the ATS Petition on August 11, 1972 in which they denied any misrepresentation in filing their application to serve Council Bluffs, and contended, "This Commission may not—and it properly did not—extend for the State of Nebraska the latter's jurisdiction beyond its borders in order to give ATS protection against an application for facilities to serve Iowa." (Mobilephone-Curtin Call Opposition, p. 2). The Opposition noted, further, this Commission's finding that Curtain Call and Mobilephone were qualified applicants proposing Council Bluffs facilities to serve a demonstrated need for service in and around that city. "So long as Curtin Call and Mobilephone, in the operation of their stations, take no action in Nebraska inconsistent with the valid regulatory authority of that jurisdiction (and this Commission's recognition of that authority) their motivation is not the critical factor. Whatever the Nebraska Commission's jurisdiction, this Commission may properly determine the need for a facility located in Iowa—and this is what this Commission has done" (Opposition, p. 3).

10. As far as need for the Council Bluffs service is concerned Mobilephone and Curtin Call reiterated that they had firm orders for service which this Commission had found sufficient, and that unlike the existing carrier in *Long Island Paging, supra*, ATS was not "a shoestring operation" which had failed to develop a market and would be seriously damaged by the advent of new service in the same area" (Opposition, p. 4). The Opposition argues that ATS had divested itself of the right to complain of the combined treatment of its applications by the Commission as a single application, and a partial grant of it by the Commission because of the failure of ATS to comply with Section 21.29 of the Rules. The Opposition also disagrees with the ATS contention that it had not been informed of the reasons for the Commission action, referring specifically to Paragraphs 14–16 of the Memorandum Opinion and Order. In addition, the Opposition denies that ATS was excluded from the time-sharing agreement which had been entered into between Curtin Call and Mobilephone (Opposition, p. 11). Rather, ATS "consistently declined to join in the frequency time sharing, and thus did not participate in—rather than being excluded from—negotiation." (*Ibid.*) ATS, the Opposition further contends, cannot be prejudiced by the time sharing agreement, because it has now chosen to join in the interim frequency time sharing arrangement.

11. The ATS Reply to the Joint Opposition was filed August 31, 1972, and contends that the Commission has ignored the ATS charges that Curtin Call and Mobilephone had misrepresented to this Commission that their intention is to serve Iowa customers only. Attached to the Reply in support of this contention, is a Xerox copy of a page

[3] The Commission's action denying the ATS petition to revoke Curtin Call's license for Station KFQ940 at Clayton, Missouri was not premature, as contended by ATS (Petition for Partial Reconsid., p. 20). Even though at the time of adoption of our original Memorandum Opinion and Order we had not acted upon the assignment application for that station we found insufficient grounds for revoking the station license.

from the Council Bluffs, Iowa, Yellow Page Telephone Directory displaying a Council Bluffs Mobilephone ad which states in part:

"Locally Owned & Operated from Council Bluffs.
Coverage to the Following Areas:
Metropolitan Council Bluffs and Omaha;
North to Missouri Valley;
South to Glenwood;
East to Oakland."

ATS contends that the ad discloses an intent to serve Omaha customers (Reply, p. 3), in direct contradiction of statements made to this Commission and fully warrants setting the matter for hearing.

12. In addition, the ATS Reply contends that Curtin Call and Mobilephone have not met the burden of showing that the services which they propose in Council Bluffs cannot be met just as well, if not better, by ATS; that it was never informed by the Commission of the reason for the consolidation of its applications; that the grant of the amended applications of Curtin Call and Mobilephone which proposes shared-use of the one-way signalling channel was a violation of the Commission's own rules, because the amendments were major in character; and, finally, that ATS has standing to challenge proposals by Curtin Call and Mobilephone principals "in other areas where common basic qualifications issues are involved." (Reply, p. 7)

DISCUSSION

13. After full consideration, we have concluded that ATS has not brought any new matters to our attention which warrant modification of the Memorandum Opinion and Order of which reconsideration has been sought. Except for an advertisement in the Council Bluffs, Iowa, Yellow Pages Telephone Directory and a letter from an Omaha law firm to the Nebraska Railway Commission, which were brought to our attention for the first time in the ATS Reply filed August 31, 1972, we are persuaded that the matters raised by ATS on reconsideration have either been fully considered in the original Memorandum Opinion and Order or present no new and substantial questions which require extended treatment by us now.

14. ATS seeks reconsideration on five grounds: first, that the principals of Curtin Call and Mobilephone have made serious misrepresentations to this Commission by stating in their applications their intent to serve Council Bluffs when in fact, their principal intent is to serve Omaha; second, that Curtin Call and Mobilephone have made an inadequate showing of need for the facilities that the Commission granted to them, and that there was no consideration of the ATS argument that ATS, as the single, established radio common carrier in Omaha can provide service to both Council Bluffs and Omaha, and that the grants to Curtin Call and Mobilephone will seriously fragment the Omaha-Council Bluffs market and lead to inefficiency in the use of the radio spectrum; third, that ATS was qualified to receive a grant of the two-way radiotelephone channel (Base Station Frequency 152.15 MHz) and that it was erroneous to combine the application for that channel with its other pending applications, and then deny that application under the guise of making a partial grant to ATS; fourth,

that the grant of the mutually exclusive Curtin Call and Mobilephone applications for the 158.70 MHz one-way signaling channel in Council Bluffs on a shared-time basis was erroneous, because the sharing agreement between Curtin Call and Mobilephone which preceded that grant constituted a major modification of their applications, which was a basis for their dismissal under the Commission's rules; and, fifth, that the grant of temporary authority to Curtin Call and Mobilephone to operate on the 158.70 MHz one-way signaling channel pending the outcome of the comparative hearing, violates ATS' *Ashbacker* rights, even though ATS has accepted the Commission's offer to participate in the interim operation.

15. We will discuss each of the ATS points in turn. First, the misrepresentation matter: As we have noted above, we have found nothing in our review of the pleadings filed by the parties to warrant designating any of the Curtin Call or Mobilephone applications for hearing or instituting revocation proceedings against their licenses. While it is true that the principals of Curtin Call and Mobilephone, in the past, have sought authority from the Nebraska State Commission to operate radio common carrier services in Omaha, that does not warrant the conclusion that a wilful misrepresentation has been made to this Commission regarding their presently pending applications. As the United States Court of Appeals for the District of Columbia Circuit recently held in *Hartford Communications Committee, et al.*, v. *FCC*, (Case No. 72–1171, Decided August 14, 1972) this Commission is not required to set a matter for hearing on the basis of factual disputes unless there are *substantial* and *material* questions of fact. The Court stated, "If a substantial and material question of fact is raised, or if for any reason the Commission cannot make a finding that the grant of the application will serve the public interest, section 309(e) requires that the application be designated for hearing" (Slip op., p. 5). A review of our Memorandum Opinion and Order where we considered the misrepresentation matter at length (see paras. 10–11, 22–28, 30, 37–39) and our consideration of the new material attached to the ATS reply lead us to conclude that no substantial question of fact has been presented warranting either the designation of the Curtin Call or Mobilephone applications for hearing or instituting license revocation proceedings. That material, as we have noted above, consists of an advertisement in the Council Bluffs, Iowa, Yellow Pages Telephone Directory by Council Bluffs Mobilephone offering radio coverage to, among other places, the Metropolitan Council Bluffs & Omaha.[4] In concluding that no substantial issue of fact is presented, we find that the advertisement appears in the Council Bluffs Telephone Directory (not the Omaha Directory), and it discloses no intent to serve Omaha customers or residents. The plain meaning of the ad, rather, appears to be that a Council Bluffs customer subscribing to the Mobilephone radio paging service can expect to carry his paging unit into the areas described in the ad and still receive service. To infer that the intent of the ad is to invite persons located in Omaha to subscribe would be

[4] Attached to the Reply, also, is a letter from the Omaha, Nebraska, law firm of Erickson, Sederstrom, Johnson and Birmingham to the Nebraska Railway Commission dated August 30, 1972, bringing this matter to that Commission's attention with the request that it advise us of their position on the ad "which is indicative of the intent to serve subscribers beyond Council Bluffs, Iowa." (Letter, p. 3)

inconsistent with the testimony of Mr. Curtin before the Nebraska Railway Commission and cited by ATS in its Petition for Partial Reconsideration (page 7). There Mr. Curtin testified that it would have been a great advantage for him to locate in Omaha, rather than Council Bluffs "because locating in Council Bluffs you would get shadows undoubtedly . . . [with] pockets of no reception in the Omaha area . . . The best site is in Omaha." It simply would not make sense for a businessman to offer to provide a service to Omaha customers only if it is not technically feasible for him to do so.

16. Second, the showings of need by Curtin Call and Mobilephone for the grant of a single two-way channel to each:[5] This matter, like that involving misrepresentations, was considered fully in our original Memorandum Opinion and Order (See paras. 27–30, 26–39), and we are of the view that there is little that we can add here that will make our position clearer. ATS argues that it can better serve Council Bluffs since it is already established in Omaha, just across the river from Council Bluffs, where Curtin Call and Mobilephone do not have a certificate from the Nebraska State Railway Commission. First, we should point out that ATS is not prohibited from providing service in Iowa in competition with Curtin Call and Mobilephone. As a matter of fact, it ought to be able to compete very effectively because of its unique authority to serve not only Council Bluffs, but Omaha, a city over five times larger than Council Bluffs (35 FCC 2d at 445). While a single carrier might be able to operate more efficiently in the Council Bluffs-Omaha area than a multiplicity of carriers we think it important to note, also, that the two-way channels which we granted to Curtin Call and Mobilephone had not been sought by ATS; that both applicants had demonstrated a need based upon pending orders for service (See 35 FCC 2d at 456–457, 461–463); that even though the Omaha-Council Bluffs area is considered a single major trading area (35 FCC 2d at 445), the total population of the two cities alone is over 400,000—more than adequate in our view to support operations of the order proposed here.

17. We stated in our Memorandum Opinion and Order (35 FCC 2d at 457) with respect to Curtin Call's Application, "since there is no local two-way or one-way service for that area of about 70,000 people and to ensure a fair and equitable distribution of frequencies we have concluded that the public interest would be served by a grant of Curtin Call's application for a two-way UHF channel to serve Council Bluffs." ATS contends that this is contrary to our decision in *Orange County Radiotelephone Service, Inc.*, 5 FCC 2d 848 (1966); but we do not hold that Section 307(b) of the Communications Act must be applied here. We stated in the *Orange County* proceeding, in part:

> Since the legislative history establishes that Section 307(b) was enacted to govern broadcast service, the Commission is not required by statutory mandate to apply the section to nonbroadcast services. Whether the Commission, in its discretion, may apply the section to such cases is a different question. We believe that section 307(b) should not be applied to the common carrier Domestic Public Land Mobile Radio Service case before us [i.e., *Orange County*]. We believe that

[5] The issue of need for the one-way signalling services proposed by ATS on the one hand, and Curtin Call and Mobilephone jointly in Council Bluffs has been set for hearing (35 FCC 2d at 469–470).

the States and communities test of section 307(b) is not proper here. Instead, we have spelled out by rule, 21.516, the test of need for *additional* channels sought and the showing required to support need. (Emphasis supplied).

We have simply found that both Curtin Call and Mobilephone which are applying for their *first* channels have demonstrated a need for the services they propose, and that a fair and equitable distribution of frequencies would be effected by a grant of their applications. We realize that we are faced with a delicate balance of interests and considerations: state boundaries are involved, as well as subtle economic and technical factors. On balance, it is our view that there is merit in permitting the public in Council Bluffs a choice of service, particularly since we have before us three entrepreneurs who believe that they can provide it profitably, and so we adhere to the view that we have treated the issue of need adequately.

18. We disagree with ATS that our holding here conflicts with the Commission position in *Long Island Paging*, *supra*, which is that need cannot be presumed; it must be proven by the applicant (20 FCC 2d 411–412). We stated there:

> Although there were several approaches available to [Long Island] Paging by which it could have met its burden, it clearly failed to follow any of them, relying instead on a vague and incomplete showing. Generally speaking, Paging did not relate any statistics or offer any specific facts tending to show a need for service either in the area to which it would provide a first service or in the area where it would compete with MRN [Footnote omitted.] More specifically, no showing was made as to the nature and economics of the service area [Footnote omitted.] Paging conducted no survey in the area to determine what need, *if any*, exists for a one-way signaling service.

It is obvious from what we have already said that the quantum of proof required from an applicant regarding need must depend on the showing made in the particular application, considered in the context of the area and population to be served. Suffice it to say that Curtin Call and Mobilephones have met their burdens here; their showings were not vague; and, in our view, were as complete as could be reasonably expected under the circumstances.

19. The third major error alleged by ATS is that the Commission erroneously "re-wrote" its application for various facilities in the Omaha-Council Bluffs area, combining them into one application and, without informing ATS of the reasons for its action, made a partial grant of the combined application. We reject the ATS allegations as unfounded and contradicted by the record. The practice of considering together multiple applications filed by an individual is well established in the Domestic Public Land Mobile Radio Service, and it is followed when the Commission can find that the applicant has demonstrated a need for some, but not all, of the facilities it has requested. (See, *e.g.*, *Mobile Radio Communications, Inc.*, 29 FCC 2d 62 (1971).) The great virtue of the practice is that it gives the applicant who receives a partial grant an option, which must be exercised within twenty days under Section 21.29 of the Commission's Rules. The applicant can either accept the partial grant of his application without the necessity of going through a hearing, or reject that grant and receive a hearing to determine whether he ought to receive all the facilities that he requested. There was no question here, but that ATS was aware of the rule, since it was called to its attention in Paragraph 20 of the Memo-

randum Opinion and Order (35 FCC 2d at 453). ATS has chosen, however, to ignore the rule by simply accepting the grant of one VHF and two UHF two-way channels and then petitioning for reconsideration of the denial of four more two-way channels. As we stated in *Pattersonville Telephone Co.*, FCC 72–588, released June 30, 1972, this is not a tardy attempt to exercise rights under Section 21.29, because at no time has ATS rejected the partial grant. Rather, it is an attempt by ATS to derive the benefits on Section 21.29 without assuming its responsibilities. This, of course, we cannot condone.

20. We reject completely a fourth point argued by ATS that the sharing agreement between Curtin Call and Mobilephone constituted a major amendment of their application which should, therefore, have been dismissed. We have already addressed the benefits to the public derived from an agreement between applicants to share the use of a one-way signalling radio channel rather than contest with one another in a possible lengthy comparative hearing for exclusive use of it, and so we will not repeat these views here. (See 35 FCC 2d at 458, particularly Para. 32). As far as a sharing agreement constituting a major amendment to the affected application, we disagree completely. Major amendments are defined in Section 21.23(c) of our Rules as: those which change or add a frequency, improve the operating characteristics of an existing or proposed station or enlarge the service contour, significantly change the location or points of communication of an existing or proposed station, or which will materially alter the nature of an existing or proposed service. While the foregoing description is not intended to be all-inclusive we can state unhesitatingly that none of the foregoing effects occur as a result of a time-sharing agreement. The frequencies, service area contours, transmitter power all remain the same. Two or more operators simply share a one-way signalling channel time-wise in such a way that they can transmit their brief radio signals in a coordinated fashion without harmful interference being caused to one another. To conclude that such agreements effect major amendments to applications would completely negate our policy encouraging time-sharing agreements, and so we interpret Section 21.23(c) of our Rules as not including time-sharing agreements for one-way signalling stations.

21. The fifth major point made by ATS is that the grant of authority to Curtin Call and Mobilephone to operate on the 158.70 MHz one-way signalling channel pending the outcome of the comparative hearing prejudices ATS' *Ashbacker* rights. Since our Memorandum Opinion and Order was released ATS has formally notified the Commission by letter that it intends to accept the Commission invitation and join with Curtin Call and Mobilephone in the temporary operation. We fail to comprehend, in light of this, how ATS can be prejudiced by such an operation in which it is a participant. As far as the ATS arguments regarding its *Ashbacker* rights are concerned, our position has been fully stated in Paragraph 33 of the Memorandum Opinion and Order (35 FCC 2d 459–461), and we see no point in repeating our thoughts here.

SUMMARY AND CONCLUSION

22. After fully considering all of the foregoing pleadings and data we are not persuaded that our original Memorandum Opinion and Order was erroneous and should, therefore, be modified. We have given careful consideration to all of the points raised by ATS, and those that we have not specifically addressed we do not deem to be of decisional significance.

23. In view of the foregoing we REAFFIRM one Memorandum Opinion and Order in the captioned matter (FCC 72–420, 35 FCC 2d 443), and DENY both the Petition for Partial Reconsideration and Motion for Partial Stay filed by ATS Mobile Telephone Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-266

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
A. V. BAMFORD, CORPUS CHRISTI, TEX.	Docket No. 19089 File No. BPH-7006
A. V. BAMFORD, COLORADO SPRINGS, COLO.	Docket No. 19158 File No. BP-18467
ENID C. PEPPERD AND DONA B. WEST, D.B.A. BROCADE BROADCASTING CO., BOULDER, COLO.	Docket No. 19159 File No. BP-18470
For Construction Permits	

ORDER

(Adopted September 25, 1972; Released September 26, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration: (1) the request for clarification and immediate severance and grant of application, filed August 30, 1972, by Brocade Broadcasting Company, and the comments thereto, filed on September 11, 1972, by the Broadcast Bureau; (2) the Initial Decision herein, FCC 72D-44, released July 11, 1972 and (3) Broadcast Bureau's appeal from Administrative Law Judge's order allowing reimbursement of A. V. Bamford, filed August 25, 1972;

2. IT APPEARING, That, by Memorandum Opinion and Order, FCC 72M-873, released July 11, 1972, Administrative Law Judge Lenore G. Ehrig granted a joint petition for approvel of agreement, approved reimbursement to A. V. Bamford and granted the application of Brocade Broadcasting Company; and

3. IT FURTHER APPEARING, That, on August 25, 1972, the Broadcast Bureau appealed from the Examiner's order allowing reimbursement to A. V. Bamford; that since the appeal relates only to the amount of reimbursement, Brocade Broadcasting Company requests that its application be severed from this proceeding and granted; and that the Broadcast Bureau believes that under the circumstances such severance and grant would be consistent with the public interest; and

4. IT FURTHER APPEARING, That it would be appropriate to sever and grant the application of Brocade Broadcasting Company, but to retain Brocade as a party respondent to this proceeding pending resolution of the Broadcast Bureau's appeal; [1]

5. ACCORDINGLY, IT IS ORDERED, That the request for clarification and immediate severance and grant, filed August 30, 1972,

[1] Under the terms of the applicants' agreement, grant of Brocade's application is not contingent on approval of reimbursement, and reimbursement is to take place only if the outstanding character issues specified against Bamford are resolved in that applicant's favor.

by Brocade Broadcasting Company IS GRANTED to the extent indicated below, that the application of Brocade Broadcasting Company IS SEVERED from this proceeding and IS GRANTED, and that Brocade Broadcasting Company IS RETAINED in hearing status as a respondent.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-829

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
BROADCAST PROCEDURE MANUAL

SEPTEMBER 26, 1972.

THE COMMISSION, BY COMMISSIONERS BURCH (CHAIRMAN), JOHNSON, H. REX LEE, REID, WILEY, AND HOOKS, ISSUED THE FOLLOWING PUBLIC NOTICE:

BROADCAST PROCEDURE MANUAL

Notice is hereby given of the issuance of a pamphlet entitled, "The Public and Broadcasting—A Procedure Manual." In the manual, an effort is made to outline the respective roles of the broadcast station, the Commission, and the concerned citizen in the establishment and preservation of quality broadcasting services; to outline procedures available to the citizen, and to provide practical advice concerning their use. We are hopeful that the manual will encourage participation by members of the community and that it will direct such participation along lines which are most effective and helpful to the Commission.

Action by the Commission September 20, 1972. Commissioners Burch (Chairman), Johnson, H. Rex Lee, Reid, Wiley, and Hooks.

THE PUBLIC AND BROADCASTING—A PROCEDURE MANUAL

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INTRODUCTION

1. Establishing and maintaining quality broadcasting services in a community is the responsibility of broadcast station licensees and

the Federal Communications Commission.[1] It is also, however, a matter in which members of the community have a vital concern and in which they can and should play a prominent role.

2. Licensees of radio and television stations are required to make a diligent, positive and continuing effort to discover and fulfill the problems, needs and interests of the communities they serve. The Commission encourages a continuing dialog between stations and community members as a means of ascertaining the community's problems, needs and interests and of devising ways to meet and fulfill them. Members of the community can help a station to provide better broadcast service and more responsive programming by making their needs, interests and problems known to the station and by commenting, whether favorably or unfavorably, on the programming and practices of the station. Complaints concerning a station's operation should be communicated promptly to the station, and every effort should be made, by both the complainant and the licensee, to resolve any differences through discussion at the local level.

3. The Commission is responsible for seeing that stations do in fact meet their obligations to the community. It considers complaints by members of the community against a station and before issuing or renewing a broadcast station license, must find that its action will serve the public interest, convenience and necessity. However, to effectively invoke the Commission's processes, the citizen must not only concern himself with the quality of broadcasting but must know when, how and to whom to express his concern. On the one hand, the Commission is in large measure dependent on community members to bring up matters which warrant its attention. On the other, if resolute efforts are not first made to clear up problems at the local level, the Commission's processes become clogged by the sheer bulk of the matters brought before it.

4. If direct contact with a station does not produce satisfactory results, there are a number of formal and informal ways for members of the community to convey their grievances to the Commission and to participate in proceedings in which the performance of a station is judged and legitimate grievances are redressed. The purpose of this manual is to outline procedures available to the concerned citizen and to provide information and practical advice concerning their use. It is

[1] The Federal Communications Commission is an independent Government agency responsible for regulating interstate and foreign communication by radio and wire. One of its responsibilities is to determine who is to operate the limited number of broadcast stations, to regulate the manner in which they are operated, and to generally supervise their operation, to the end that such operation may serve the interests of the public. This booklet deals only with this one aspect of the Commission's responsibilities.

The FCC is composed of seven members, who are appointed by the President subject to confirmation by the Senate. Normally, one Commissioner is appointed or reappointed each year, for a term of seven years. One of the Commissioners is designated by the President to serve as Chairman, or chief executive officer, of the Commission.

The Commissioners, functioning as a unit, supervise all activities of the Commission. They are assisted by a staff of approximately 1500 persons. Note that the term "Commission" refers both to the seven Commissioners as a unit and to the entire agency, including the staff. For a general description of the Commission and its organization, see 47 CFR 0.1–0.5. For a full description of the Commission's functions and of authority delegated by the Commission to its staff, see 47 CFR Part 0. (The Commission's Rules are printed in Volume 47 of the Code of Federal Regulations (CFR). See paras. 60 and 61 below.)

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not a substitute for the Rules of Practice and Procedure (47 CFR Pt. 1).[2] We are hopeful, however, that it will help community members to participate effectively and in a manner which is helpful to the Commission.

Proceedings Involving Particular Applicants and Licensees

INITIATING A PROCEEDING

5. *Complaints Generally.* A complaint against a broadcast station[3] can be filed with the Commission by any person at any time. You can go about it any way you wish; there are no particular procedural requirements, except as noted below. You should, however, bear the following facts in mind:

(a) During fiscal year 1971, the Commission received 53,503 complaints, comments and inquiries concerning broadcast stations. Of this total, 23,424 were complaints.

(b) Almost all of these communications are initially considered and dealt with by approximately 5 Commission employees who are specially assigned this function. Additional personnel are assigned to a matter only if, on the initial examination, the complaint appears to warrant extensive inquiry, investigation or formal proceedings.

In light of this situation, there are a number of practical steps you can take which will be helpful to the Commission and will increase your effectiveness in making a complaint. These are set out below:

(1) Limit your complaint to matters on which the Commission can act. With minor exceptions (the provision of "equal time" for candidates for public office, for example), we cannot direct that a particular program be put on or taken off the air. Nor are we arbiters of taste. Our concern, moreover, is with matters which affect the community generally (the public interest) rather than with the personal preferences or grievances of individuals. Another publication, "The FCC and Broadcasting", contains more detailed information (in areas in which numerous complaints are received) regarding what the Commission can and cannot do. Copies will be furnished by the Complaints and Compliance Division of the Commission's Broadcast Bureau upon request.

(2) Submit your complaint first to the station involved. The station may well recognize the merit of your complaint and take corrective action, or may explain the matter to your satisfaction. If you are not satisfied with the station's response, it will aid and expedite action on your complaint to the Commission to enclose a copy of your complaint to the station and all subsequent correspondence between you and the station. (Though this way of proceeding is generally far preferable to complaining initially to the Commission, this is not always the case. If, for example, the complainant has reason for not disclosing his identity to the station, he may complain directly to the Commission, requesting that his identity not be disclosed.)

(3) Submit your complaint promptly after the event to which it relates.

(4) Include at least the following information in your letter of complaint:

a. The full name and address of the complainant.
b. The call letters and location of the station.
c. The name of any program to which the complaint relates and the date and time of its broadcast.
d. A statement of what the station has done or failed to do which causes you to file a complaint. Be as specific as possible. Furnish names, dates, places and other details.

[2] The manual reflects procedures and policies in effect on September 20, 1972. Persons using this manual are cautioned that these procedures and policies are subject to change and that any changes made after September 20, 1972 are not reflected in this manual. In particular, it is noted that broad studies of the fairness doctrine (Docket 19260) and the renewal procedures (Dockets 19153 and 19154) were in progress when this manual was issued.

[3] Complaints relating to some of the operations of networks and other organizations associated with broadcasting can also be filed.

e. A statement setting forth what you want the station and/or the Commission to do.

f. A copy of any previous correspondence between you and the station concerning the subject of the complaint.

(5) Try to appreciate that the person reviewing your complaint must make rapid judgments regarding the gravity of the matters related and the action to be taken. There are a number of simple things you can do to make his job easier and to aid your own cause. State the facts fully and at the beginning. Subject to fully stating the facts, be as brief as possible. If the facts are self-explanatory, avoid argument; let the facts speak for themselves. Avoid repetition or exaggeration. If you think a specific law or regulation has been violated, tell us what it is. If possible, use a typewriter, but if you do write by hand, take special pains to write legibly.

6. A complaint received by the Commission is dealt with as follows:

(1) If the complaint does not allege a substantial violation of statute or of Commission rule or policy, if inadequate information is submitted, or if the factual statement is not sufficiently specific, a letter (which is often a form letter) explaining these matters is directed to the complainant.

(2) If the complaint does allege specific facts sufficient to indicate a substantial violation, it is investigated, either by correspondence with the station (which may produce a satisfactory explanation or remedial action) or, in rare instances, by field inquiry. (Since the Commission's investigatory staff is small, the number of complaints which can be investigated by field inquiry is limited.) If further information from the complainant is needed, he is asked to furnish it. If the staff concludes that there has been a violation, it may recommend to the Commission that sanctions be imposed on the station; it may direct remedial action (such as equal opportunities for a candidate for public office); or, where extenuating circumstances are present (as where the violation follows from an honest mistake or misjudgment or where the station otherwise has a good record), it may note the violation but not recommend a sanction. Possible Commission actions range from the imposition of monetary forfeitures not exceeding $10,000 and short-term renewal of license to revocation of license or denial of an application for renewal of license. The imposition of sanctions involves formal proceedings (which may include a hearing) and, in connection with such proceedings, the complainant may be asked to submit a sworn statement or to appear and give testimony at a hearing before an administrative law judge. In some circumstances, the complainant is entitled, and may choose, to participate as a party to the proceeding. A hearing is ordered in a renewal or revocation proceeding only if substantial questions have been raised concerning the licensee's qualifications.

7. Four types of complaint require compliance with specific procedures and submission of specific information. These complaints involve compliance with the requirement of equal time for political candidates, the fairness doctrine, the personal attack rule, and the rule governing political editorials. Generally, these matters should be taken up with the station before a complaint is filed with the Commission. However, where time is an important factor, you may find it advisable to complain simultaneously to the station and the Commission. In such circumstances, complaints are often submitted and answered by telegraph and, where the matter is most urgent, by telephone.

8. *Political broadcasting.* Section 315 of the Communications Act, 47 U.S.C. 315,[4] provides that if any Commission licensee shall permit any person *who is a legally qualified candidate for any public office* to use a broadcast station, he shall afford to all other candidates for that office equal opportunities to use the station's facilities. Appear-

[4] The Communications Act is printed in Title 47 of the United States Code (U.S.C.). See para. 59 below.

ances by candidates on the following types of programs are exempt from the equal opportunities requirement:

1. Bona fide newscast;
2. Bona fide news interview;
3. Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or
4. On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

However, where candidates appear on programs exempt from the equal opportunities requirement, broadcasters must nevertheless meet the obligation imposed upon them under the Communications Act (to operate in the public interest) and the fairness doctrine (to afford reasonable opportunity for the discussion of conflicting views on controversial issues of public importance). See para. 12 below. The equal opportunities and fairness doctrine requirements are applied to networks as well as to stations.

9. A request for equal opportunities *must* be made directly to the station or network and *must* be submitted within one week after the *first* broadcast giving rise to your right of equal opportunities. This is most important, as your right is lost by failure to make a timely request. To make it as clear as possible, we offer the following example:

A, B and C are legally qualified candidates for the same public office. A makes an appearance on April 5 on a program not exempted by the statute. On April 12, B asks for an equal opportunity to appear on the station and does, in fact, appear on April 15. On April 16, C asks for an equal opportunity to appear. However, he is not entitled to do so, as he has failed to make his request within one week after A's appearance. If the station allows him to appear, it must subsequently grant any timely request for equal opportunities submitted by A and B.

There is an exception to this requirement where the person requesting equal opportunities was not a candidate at the time of the first broadcast giving rise to the right of equal opportunities. See 47 CFR 73.120(e).

10. If you are a candidate or his designated agent and think that the candidate has been denied equal opportunities, you may complain to the Commission. A copy of this complaint should be sent to the station. Your letter of complaint should state (1) the name of the station or network involved; (2) the name of the candidate for the same office and the date of his appearance on the station's facilities; (3) whether the candidate who appeared was a legally qualified candidate for the office at the time of his appearance (this is determined by reference to the law of the state in which the election is being held); (4) whether the candidate seeking equal time is a legally qualified candidate for the same office; and (5) whether you or your candidate made a request for equal opportunities to the licensee within one week of the day on which the first broadcast giving rise to the right to equal opportunities occurred.

11. A political broadcasting primer ("Use of Broadcast Facilities by Candidates for Public Office"), containing a summary of rulings interpreting the equal opportunities requirement, has been published

in the Federal Register and in the FCC Reports [5] (35 F.R. 13048, 24 F.C.C. 2d 832) and is available from the Commission upon request, as is a question and answer pamphlet ("Use of Broadcast and Cablecast Facilities by Candidates for Public Office") (37 F.R. 5796, 34 F.C.C. 2d 510). See also 47 U.S.C. 315 and 47 CFR 73.120.

12. *Fairness Doctrine.* Under the fairness doctrine, if there is a presentation of a point of view on a controversial issue of public importance over a station (or network), it is the duty of the station (or network), in its overall programming, to afford a reasonable opportunity for the presentation of contrasting views as to that issue. This duty applies to all station programming and not merely to editorials stating the station's position. The station may make offers of time to spokesmen for contrasting views or may present its own programming on the issue. It must present suitable contrasting views without charge if it is unable to secure payment from, or a sponsor for, the spokesman for such views. The broadcaster has considerable discretion as to the format of programs, the different shades of opinion to be presented, the spokesman for each point of view, and the time allowed. He is not required to provide equal time or equal opportunities; this requirement applies only to broadcasts by candidates for public office. The doctrine is based on the right of the public to be informed and not on the proposition that any particular person or group is entitled to be heard.

13. If you believe that a broadcaster (station or network) is not meeting its obligation to the public under the fairness doctrine, you should complain first to the broadcaster. If you believe that a point of view is not being presented and wish to act as spokesman for that point of view, you should first notify the broadcaster. Barring unusual circumstances, complaints should not be made to the Commission without affording the broadcaster an opportunity to rectify the situation, comply with your request, or explain its position.

14. If you do file a fairness doctrine complaint with the Commission, a copy should be sent to the station. The complaint should contain specific information concerning the following matters: (1) the name of the station or network involved; (2) the controversial issue of public importance on which a view was presented; (3) the date and time of its broadcast; (4) the basis for your claim that the issue is controversial and of public importance (either nationally or in the station's local area at the time of the broadcast); (5) an accurate summary of the view or views broadcast; (6) the basis for your claim that the station or network has not broadcast contrasting views on the issue or issues in its overall programming; and (7) whether the station or network has afforded, or has expressed the intention to afford, a reasonable opportunity for the presentation of contrasting viewpoints on that issue.

15. A fairness primer ("Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance"), containing a summary of rulings interpreting the fairness doctrine, has been published in the Federal Register and the FCC Reports (29 F.R. 10416, 40 F.C.C. 598), and is available from the Commission upon request.

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[5] See para. 62 below.

16. *Personal attacks.* The personal attack rule requires that when, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the broadcaster must, within one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the station's facilities free of charge. See 47 CFR 73.123(a). The personal attack rule does not apply to attacks made in the course of a bona fide newscast, a bona fide news interview, or on-the-spot coverage of a bona fide news event (including commentary or analysis by newsmen offered as part of such programs). Though the specific requirements of notice and an offer of an opportunity to respond do not apply to such programs, the other requirements of the fairness doctrine do apply. For other circumstances in which the personal attack rule does not apply, see 47 CFR 73.123(b). See also, the fairness primer, described above in para. 15.

17. If you believe that you or your group has been personally attacked during presentation of a controversial issue, and if you are not offered an opportunity to respond, you should complain first to the station or network involved. If you are not satisfied with the response, you may then complain to the Commission.

18. If you file a complaint with the Commission, a copy should be sent to the station. The complaint should contain specific information concerning the following matters: (1) The name of the station or network involved; (2) the words or statements broadcast; (3) the date and time the broadcast was made; (4) the basis for your view that the words broadcast constitute an attack upon the honesty, character, integrity or like personal qualities of you or your group; (5) the basis for your view that the personal attack was broadcast during the presentation of views on a controversial issue of public importance; (6) the basis for your view that the matter discussed was a controversial issue of public importance, either nationally or in the station's local area, at the time of the broadcast; and (7) whether the station within one week of the alleged attack: (i) notified you or your group of the broadcast; (ii) transmitted a script, tape, or accurate summary of the broadcast if a script or tape was not available; and (iii) offered a reasonable opportunity to respond over the station's facilities.

19. *Political editorials.* When a broadcast station, in an editorial, endorses a legally qualified candidate for public office, it is required to transmit to other qualified candidates for the same office (1) notice as to the date and time of the editorial, (2) a script or tape of the editorial, and (3) an offer of a reasonable opportunity for the other candidates or their spokesmen to respond to the editorial over the licensee's facilities free of charge. Where a broadcast station, in an editorial, opposes a legally qualified candidate for public office, it is required to send the notice and offer to the candidate opposed. The notice and offer must be sent within 24 hours after the editorial is broadcast. If the editorial is to be broadcast within 72 hours of election day, the station must transmit the notice and offer "sufficiently far in advance of the broadcast to enable the candidate or candidates to have

a reasonable opportunity to prepare a response and to present it in timely fashion." See 47 CFR 73.123(c). See also, the fairness primer described above in para. 15.

20. If you are a candidate or his authorized spokesman and believe that the station, in an editorial, has opposed the candidate or supported his opponent and has not complied fully with these requirements, you should complain to the station or network involved. If, in response to your complaint, the station does not offer what you consider to be a reasonable opportunity to respond to the editorial, you may complain to the Commission. Send a copy of your complaint to the station.

Participation in Application Proceedings

21. *General.* Public expression regarding the operation of broadcast stations is not limited to letters of complaint. You can also support or object to applications filed with the Commission, such as an application for a new license, a change in existing facilities (for example, an increase in tower height or transmitter power or a change in studio location), or the renewal or transfer of a current license. You may proceed either formally, by filing a "petition to deny", or informally, by filing an "informal objection". (See below.) You may raise any public interest question relating to the application or the applicant. Allegations have been made in the past, for example, that the station's programming does not serve the needs and interests of the community or that the station has engaged in discriminatory employment practices. The question raised need not relate directly to the authority sought by the applicant. Your purpose in participating could properly be to effect a change in the station's policies or practices, by negotiation or by Commission direction, rather than to have the application denied. It is desirable and important that you discuss your grievances with the station, as they occur, and try to work out a mutually acceptable solution, either prior to or in lieu of filing an objection to the grant of an application. The Commission does not look with favor on objections to a grant where grievances have been "stored up" during the license term, without being brought to the station's attention, and are disclosed for the first time in objections to an application.

22. With certain minor exceptions, all broadcast applicants are required to give notice to the community that they have filed an application with the Commission. See 47 CFR 1.580. Notice is published in local newspapers and (in the case of most existing licensee-applicants) is broadcast over their facilities. Public notice of the filing of the application is also given by the Commission. Applicants and licensees are required to maintain locally for public inspection copies of applications and other documents as specified in the Commission's Rules. See 47 CFR 1.526. The notice given locally by the station will state the address at which these documents can be inspected. Additional papers relating to the station, including those kept locally, are available for inspection at the Commission's office in the District of Colum-

bia.[6] Except in the case of certain minor applications (see 47 U.S.C. 309), the Commission must give notice of the acceptance of the application for filing at least 30 days before acting on it. See paras. 33 and 34 below.

23. *Informal objection.* If you have information which you believe should be considered by the Commission in determining whether the grant of an application would serve the public interest, convenience and necessity, you may file an "informal objection". See 47 CFR 1.587. Such objections may be filed in writing with the Secretary of the Commission, Washington, D.C. 20554, at any time prior to action on the application, and must be signed by the person making them. There are no other requirements.

24. The informal objection procedure is designed for use by persons who cannot qualify as "parties in interest" (see para. 30 below) or who (though they qualify as parties in interest) do not choose to assert the rights or to assume the burdens of parties to the proceeding. In addition, pleadings or communications submitted by persons who desire to participate as parties to the proceeding but which fail to meet the requirements for "petitions to deny" (see para. 29 below) are treated as informal objections.

25. Informal objections are dealt with much in the same manner as complaints and should include at least the minimum information required for an effective complaint (see para. 5, above). They are associated with the application to which they relate, however, and are reviewed by elements of the staff responsible for taking or recommending action on that application.

26. If in the judgment of the Commission's staff the objection does not raise a substantial public interest question, it will not be referred to the Commission (that is, the Commissioners) for consideration. In such cases, the staff will give notice of Commission or staff action on the application to persons who have filed an objection, advising them that their objection has been rejected by the staff as a basis for denying the application. An application for review of staff action by the Commission may be filed. Such an application must be filed prior to seeking judicial review. See 47 U.S.C. 155(d)(7); 47 CFR 1.115.

27. If in the judgment of the staff the objection raises a substantial public interest question, it is made the subject of field inquiry or is forwarded to the applicant for comment. If the applicant is asked to comment, he is required to serve a copy of his comments on the person who filed the objection, and that person is entitled to file a reply. If there is still a substantial question, it is referred to the Commission and is dealt with on its merits in conjunction with action on the application. If the Commission concludes that a substantial and material question of fact has been presented or if it is for any reason unable to find that a grant of the application would serve the public interest, it will order a hearing. Otherwise, it will grant the application. If a

[6] Most Commission records are routinely available for inspection under the Public Information Act (5 U.S.C. 552) and Commission rules implementing that Act (47 CFR 0.441–0.467). See, in particular, §§ 0.453 and 0.455. A person wishing to inspect such records has only to go to the office where they are kept and ask to see them. Requests for inspection of records not routinely available for inspection may be submitted, and are considered, under procedures set out in § 0.461 of the rules (47 CFR 0.461). Copies of records may be obtained for a fee from a private firm which contracts with the Commission to perform this service (see 47 CFR § 0.465).

hearing is ordered, a person who has filed an informal objection will not ordinarily be named as a party to the proceeding, but may seek to participate as a witness or, within 30 days after publication of the hearing issues in the Federal Register, petition for intervention as a party. See para. 39 below.

28. If the objection is considered and disposed of in a Commission opinion granting the application, you may within 30 days petition for reconsideration or seek judicial review. If you appeal or petition for reconsideration, you should be prepared to show that you are aggrieved or adversely affected by the Commission action (47 U.S.C. 402(b)(6) and 405). If you have not participated in proceedings resulting in a grant of the application (as by filing an informal objection), or if the Commission has not been afforded an opportunity to pass on the questions you intend to raise in court, you must file a petition for reconsideration before seeking judicial review.

29. *Petition to deny.* A petition to deny, which is a formal objection to grant of an application, is subject to the following statutory requirements (47 U.S.C. 309(d)):

(1) The petition must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and which, if true, would demonstrate that a grant of the application would be inconsistent with the public interest, convenience and necessity.

(2) "Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

(3) The petitioner must serve a copy of the petition upon the applicant.

(4) The petition must be filed with the Commission within the time prescribed by the rules.

The requirements are discussed below at paras. 30–34. A petition opposing grant of an application which does not meet these requirements is treated as an informal objection. If you intend to appeal a grant of the application or wish to participate in any hearing held to determine whether the application should be granted or denied, or if you wish to assure Commission (rather than staff) action on your objections to the application, it is advisable to file a petition to deny rather than an informal objection. If you file a petition to deny, subsequent communication with Commissioners and certain other Commission personnel is limited by the Rules governing *ex parte* communications, 47 CFR 1.1201–1.1251.[7]

30. There is no hard and fast rule for determining whether a member of the listening public or a community group qualifies as a party in interest. Generally, under court precedents, members of the listening public who show that they would be aggrieved or adversely affected by a Commission action granting an application of a station in their area have standing to raise public interest questions. It is important to bear in mind this last point—that arguments for denial of the application must be directed to the public interest rather than to your own personal

[7] It is important that you not communicate privately concerning the merits or outcome of any aspect of the case with persons who may participate in deciding it. Written communications must be served on parties to the proceeding. Oral communication must be preceded by notice to the parties affording them an opportunity to be present. Persons who may participate in the decision are (1) the Commissioners and their personal office staffs, (2) the Chief of the Office of Opinions and Review and his staff, (3) the Review Board and its staff, (4) the Chief Administrative Law Judge, the administrative law judges, and the staff of the Office of Administrative Law Judges; (5) the General Counsel and his staff, and (6) the Chief Engineer and his staff.

interest. For example, you may show that you are hurt by the activities or failing of the station to which you object, as by showing that you live or work in the area served by the station and, if the charges relate to racial discrimination, that you are a member of a racial minority being discriminated against; but the substance of your arguments must be related to the interests of the community as a whole. Since the purpose of your participation is to argue for the interests of your community as a whole, it is relevant to show your ties to the community and knowledge of its problems and needs. To make a stronger showing,[8] it is also helpful to demonstrate that you are well qualified to represent the interests of the community and to aid the Commission in reaching a decision that best serves the interests of the community. You may, for example, have a background which specifically qualifies you on matters relating to your charges against the station. You may have a background in broadcasting or previous experience in Commission proceedings which would contribute to your effectiveness as a representative of the community. You may have access to information concerning the station's operations which is not generally available, as would be indicated by previous correspondence (or discussion) with the station concerning the charges set out in your petition. You may be the only member of the community who is prepared to assume the personal and financial burden which participation in Commission proceedings involves. It will help to show that others join with you in your petition or that you are serving as an authorized spokesman for a representative community group or groups. If other members of the public have separately petitioned to deny the application, you should endeavor to show that the contribution you can make would be superior to or different from that made by others. You should consider the possibility of joining with other members of the public for the purpose of participating in the hearing. If a large number of persons or groups seek to participate on behalf of the public, it is possible that some would be required to consolidate their efforts.

31. In determining whether the grant of an application is consistent or inconsistent with the public interest, the Commission is guided by the Communications Act, other laws pertinent to the facts of the case and the matters at issue, its own Rules and Regulations and policy statements, and past decisions of both the Commission and the courts. Although the facts set out in the petition to deny and the precise public interest question presented may be novel, it would be rare indeed if none of these guides could be brought to bear upon the question. It is possible, of course, to simply set out allegations of fact in a petition to deny and assert that they show that "a grant of the application would be *prima facie* inconsistent with the public interest." (47 U.S.C. 309 (d)) Obviously, however, it is far more effective for you, and helpful to the Commission, if the facts alleged are related specifically to the

[8] We do not wish to imply that a showing with respect to all of these matters, or as to any particular matter, is necessarily required to sustain your claim, or that other information may not also be appropriate. To the extent that the suggested information is set forth, however, it will enhance your showing. Do not, however, be discouraged by the number of factors listed. Our intent is to give you a general idea as to the type of information which can be submitted in support of a claim—not to indicate that the required showing is necessarily difficult to make.

policy and precedent guidelines utilized by the Commission in making its determination. An experienced attorney will be familiar with these materials and will know how to use them in effectively presenting your position.

32. Note that the statute requires *specific* allegations of *fact*. Hearsay, rumor, opinion, or broad generalizations do not meet this requirement. Note also that the allegations must "be supported by affidavit of a person or persons with personal knowledge" of the facts. The petitioner need not, himself, have personal knowledge of the facts if he submits affidavits signed by others who do. An affidavit is a written statement, the truth of which is sworn to or affirmed before an officer who has authority to administer an oath, such as a notary public. Service of the petition is accomplished by delivering or mailing a copy to the applicant, on or before the day on which the document is filed. See 47 CFR 1.47. If the applicant is represented by an attorney, it is the attorney who should be served. A certificate of service, signed by the person who delivered or mailed the petition and reciting the fact and method of service, must be attached to the petition.

33. With minor exceptions (see 47 U.S.C. 309(c) and (f)), no broadcast application may be granted earlier than 30 days following the Commission's issuance of a public notice stating that the application, or any substantial amendment thereof, has been "accepted for filing" (47 U.S.C. 309(b)). Except in the case of standard broadcast (AM radio) applications and renewal applications, the petition to deny must be filed within this 30-day period. In the case of standard broadcast (other than renewal) applications, the Commission issues a second public notice stating that the application is "available and ready for processing" and specifying a "cutoff" date, on which processing of the application will commence. Petitions to deny must be filed before the cutoff date. See 47 CFR 1.580(i).

34. Applications for renewal of licenses of broadcast stations (except experimental and developmental stations) must be filed 90 days prior to the expiration date of the license (47 CFR 1.539).[9] A petition to deny a renewal application must be filed by the end of the first day

[9] Licenses for standard broadcast (AM), FM and television broadcast stations ordinarily expire at three-year intervals from the following dates:

(1) For stations located in Iowa and Missouri, February 1, 1971.
(2) For stations located in Minnesota, North Dakota, South Dakota, Montana and Colorado, April 1, 1971.
(3) For stations located in Kansas, Oklahoma and Nebraska, June 1, 1971.
(4) For stations located in Texas, August 1, 1971.
(5) For stations located in Wyoming, Nevada, Arizona, Utah, New Mexico and Idaho, October 1, 1971.
(6) For stations located in California, December 1, 1971.
(7) For stations located in Washington, Oregon, Alaska, Guam and Hawaii, February 1, 1972.
(8) For stations located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont, April 1, 1972.
(9) For stations located in New Jersey and New York, June 1, 1972.
(10) For stations located in Delaware and Pennsylvania, August 1, 1972.
(11) For stations located in Maryland, District of Columbia, Virginia and West Virginia, October 1, 1972.
(12) For stations located in North Carolina and South Carolina, December 1, 1969.
(13) For stations located in Florida, Puerto Rico, and Virgin Islands, February 1, 1970.
(14) For stations located in Alabama and Georgia, April 1, 1970.
(15) For stations located in Arkansas, Louisiana and Mississippi, June 1, 1970.
(16) For stations located in Tennessee, Kentucky and Indiana, August 1, 1970.
(17) For stations located in Ohio and Michigan, October 1, 1970.
(18) For stations located in Illinois and Wisconsin, December 1, 1970.

For the expiration date of licenses of other classes of broadcast stations (for example, television booster and translator stations), see 47 CFR 74.15.

of the last full calendar month of the expiring license term. 47 CFR 1.580(i) and 1.516(e). Thus, for example, the license of a television station located in Illinois would ordinarily expire on December 1, 1973; the renewal application would be filed on or before September 1, 1973, and a petition to deny would have to be filed on or before November 1, 1973. There are two exceptions to the foregoing. First, the Commission may previously have issued a short-term license to the station in question; the license would in that case expire on a date specified by the Commission in its order making the short term grant rather than on the date specified in footnote 9. Second, if the renewal application is filed late, the deadline for filing a petition to deny is the 60th day after the Commission has given public notice that the late filed application has been accepted for filing.

35. The applicant may file an opposition to your petition to deny within 10 days after the petition is filed. You may file a reply to the opposition within 5 days after the opposition is due. Note that the papers must reach the Commission within these periods. Reasonable requests for extensions of time will be granted if both parties consent or upon a showing of good cause. Note that requirements applicable to the petition to deny (service, supporting affidavits, etc.) also apply to the opposition and the reply. The purpose of a reply pleading is to respond to points made in the opposition pleading; it is not intended to give a petitioner an opportunity to present new matters. Also, pursuant to Section 1.45(c) of the Commission rules (47 CFR 1.45(c)), additional pleadings may not be filed unless specifically requested and authorized by the Commission.

36. Questions raised in a petition to deny are dealt with on their merits in conjunction with action on the application in an opinion issued by the Commission (that is, by the Commissioners and not by the staff under delegated authority). The Commission will either deny your petition and grant the application, deny your petition and set the application for hearing on issues other than those you have raised, or grant your petition and set the application for hearing on some or all of the issues you have raised. If the application is granted, you may petition for reconsideration (see 47 U.S.C. 405; 47 CFR 1.106) or appeal to the United States Court of Appeals for the District of Columbia Circuit (see 47 U.S.C. 402(b)(6)). If a hearing is ordered and you are not named as a party, you may petition for reconsideration or (if you have previously made clear your wish to participate as a party) you may appeal; you may also file a petition to intervene (see 47 U.S.C. 309(e); 47 CFR 1.223) or seek participation as a witness. See para. 39 below.

37. If you file a petition to deny but do not intend to participate as a party to a hearing on the application, you should so advise the Commission in your petition. Otherwise, it will be assumed that you are asserting the right to participate and offering to prove the allegations set out in your petition; and, if a hearing is ordered and you have established your right to participate, you will be named as a party and may be assigned the burden of proceeding with the introduction of evidence and the burden of proof on the issues raised in your petition. You will be expected to appear at the hearing, present evidence, and proceed in other respects as a party. You are not required to retain

an attorney. However, it is most advisable that you do so, as it is unlikely that you will be able to participate effectively without the assistance of counsel. If you do intend to retain counsel, it is advisable to do so at an early date, so as to have his assistance in preparing the petition to deny.

PARTICIPATION IN A HEARING PROCEEDING

38. The rules governing hearing proceedings are set out in Subpart B of Part 1 of Title 47 of the Code of Federal Regulations. If you do not retain an attorney, it is important that you familiarize yourself thoroughly with those rules. It is also important that you become familiar with Subpart A, the General Rules of Practice and Procedure, many of which apply in hearing proceedings. Though the following outline of the procedural stages of a hearing proceeding may be helpful, effective participation will require a more detailed knowledge of the rules.

39. When the Commission determines that a hearing should be held, it issues an order (called a designation order) specifying the issues upon which evidence will be received and naming known parties in interest as parties to the proceeding. Shortly thereafter, the Chief Administrative Law Judge issues an order naming a presiding officer, setting a time and place for an initial prehearing conference, and specifying the place of the hearing and the date for its commencement. If you are named as a party, and wish to participate, you should, within 20 days after the designation order is mailed, file a notice of appearance stating that you will appear at the hearing. See 47 CFR 1.221. This notice and (except as otherwise expressly provided) all papers subsequently filed must be served on all other parties to the proceeding. See 47 CFR 1.47 and 1.211; see also, the rules governing *ex parte* presentations, 47 CFR 1.1201–1.1251. The notice of appearance should list the address at which you wish other parties to serve papers on you. If you are not named as a party, you may petition to intervene. See 47 CFR 1.223. To intervene as of right, you must show that you are a party in interest (see para. 30 above) and must file the petition within 30 days after the designation order is published in the Federal Register. It is not necessary for you to have participated in earlier stages of the proceeding. If the petition is filed late or if it fails to show that petitioner is a party in interest, his intervention as a party lies within the discretion of the presiding officer. You may appeal to the Review Board, as a matter of right, from an order denying your petition to intervene. See 47 CFR 1.301(a)(1). (For a description of the Review Board and its functions, see 47 CFR 0.361 and 0.365.) If the petition is denied, the person objecting may nevertheless request Commission counsel to call him as a witness. He may request other parties to the proceeding to call him as a witness. And, if these measures fail, he may appear at the hearing and ask that the presiding officer allow him to testify. If he shows that his testimony will be relevant, material and competent, he will be allowed to testify. See 47 CFR 1.225(b). A person who has been permitted to participate as a party may move before the Chief Administrative Law Judge to hold the hearing in the community where the station is located, rather than in the District of Columbia. Action on that request lies within the discretion of the Chief Administrative Law

Judge. Subject to budgetary limitations, hearings are held in the local community when it appears that there will be a sizeable number of witnesses who live in that community.

40. If you are permitted to participate as a party, a number of new rights accrue to you. If you are dissatisfied with the issues listed by the Commission, you may petition for the addition or deletion of an issue or for the modification of those which are listed. See 47 CFR 1.229. Such petitions are acted on by the Review Board. You may utilize procedures for the discovery of facts relevant to the proceeding. See 47 CFR 1.311–1.325. You may file pleadings and oppose or support any motion or petition filed by any other party to the proceeding. You may ask the presiding officer to issue subpoenas requiring the attendance of witnesses or the production of documents at the hearing. See 47 CFR 1.331–1.340. You may examine witnesses, object to the introduction of evidence, and cross-examine the witnesses of other parties. You are expected to be present at the hearing (either personally or by attorney) and to participate in the proceedings. If you subpoena witnesses, you are responsible for payment of witness fees.

41. About four weeks after the proceeding is designated for hearing, the presiding officer holds an initial prehearing conference. See 47 CFR 1.248. Additional conferences may be held. At such conferences, the presiding officer works with counsel for the parties to devise a schedule for the completion of procedures (such as discovery and summary decision procedures) to be followed by counsel and to settle as many matters as possible before the evidentiary hearing. Counsel may, for example, enter into stipulations regarding undisputed facts and reach agreement as to the scope of the issues set for hearing. They may also agree as to the authenticity of exhibits and as to the qualifications of expert witnesses. Such agreement aids counsel in the preparation of his case, allowing him to concentrate on matters which remain in dispute. It also saves the time and expense which would otherwise be involved in establishing the facts agreed upon by testimony at the hearing. By the time you attend the conference, you should have a clear understanding of what you intend to prove, how (by what witnesses and exhibits) you intend to prove it, and of any collateral procedures you intend to follow, so that you can make full use of the prehearing technique.

42. A Commission hearing is much like a trial in a civil case in a court of law. Instead of a judge, there is a presiding officer, usually one of the Commission's administrative law judges. The administrative law judge is independent of the remainder of the agency and, with minor exceptions, his sole function is to preside over and initially decide Commission hearing proceedings. The Commission's Broadcast Bureau usually participates as a party to the proceeding, on behalf of the public, and is represented at the hearing by an attorney from its Hearing Division. At the hearing proper, witnesses testify under oath, are examined and cross-examined, and a transcript is made of their testimony; exhibits are offered in evidence; the rules of evidence are applied; and various motions are made, argued and acted on. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision.

43. When the testimony of all witnesses has been heard, the presiding officer closes the record (47 CFR 1.258) and certifies the transcript and exhibits as to identity (47 CFR 1.260). Parties are afforded an opportunity to move for correction of the transcript (47 CFR 1.261) and to file proposed findings of fact and conclusions of law, which may be supported by a brief (47 CFR 1.263, 1.264). The presiding officer then prepares and issues an initial decision, which becomes effective 50 days after its issuance unless it is appealed by a party or reviewed by the Commission on its own motion (47 CFR 1.267 and 1.277(d)).

44. If you are dissatisfied with the initial decision you may, within 30 days, file exceptions to the decision, which may be accompanied by a brief. See 47 CFR 1.271–1.279. You may also, within this period, file a statement supporting the initial decision. Reply briefs may be filed within 10 days. In cases involving the revocation or renewal of a broadcast station license, the decision is reviewed by the Commission. In other broadcast cases, unless the Commission specifies otherwise, the decision is reviewed by the Review Board (47 CFR 0.365(a)). After exceptions have been filed, the parties may request an opportunity for oral argument before the Commission or the Review Board, as the case may be (47 CFR 1.277). Such requests are ordinarily granted. Thereafter the Commission (or the Board) issues a final decision (47 CFR 1.282). Within 30 days after release of a final Commission decision, you may petition for reconsideration (47 U.S.C. 405; 47 CFR 1.106) or file a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit (47 U.S.C. 402(b)). In the case of a Review Board decision, you may, within 30 days, file either a petition for reconsideration by the Board or an application for review of the decision by the Commission. See 47 U.S.C. 155(d); 47 CFR 1.101, 1.102, 1.104, 1.106, 1.113, 1.115, and 1.117. You must seek Commission review of a Board decision before seeking judicial review.

Rulemaking

45. A rule is similar to a law. It is a statement of policy to be applied generally in the future. A rule making proceeding is the process, required by law, through which the Commission seeks information and ideas from interested persons, concerning a particular rule or rule amendment, which will aid it in making a sound policy judgment. There are other ways, when a rule is not under consideration, in which the Commission seeks information needed to meet its regulatory responsibilities. It may issue a Notice of Inquiry, in which interested persons are asked to furnish information on a given matter and their views as to whether and how the Commission should deal with it. If needed information cannot be obtained in proceedings on a Notice of Inquiry, the Commission can order an investigatory hearing, in which witnesses and records can be subpoenaed. If the information obtained indicates that rules should be adopted, the Commission then initiates a rule making proceeding.

PETITION FOR RULEMAKING

46. The principal rules relating to broadcast matters are set out in the Rules and Regulations of the Commission as Subpart D of Part 1,

Part 73 and Part 74. Other provisions relating to broadcasting will be found in Parts 0 and 1. If you think that any of these rules should be changed or that new rules relating to broadcasting should be adopted by the Commission, you are entitled to file a petition for rule making. 5 U.S.C. 553(e); 47 CFR 1.401–1.407. No specific form is required for such a petition, but it should be captioned "Petition for Rule Making" to make it clear that you regard your proposal as more than a casual suggestion. An original and 14 copies of the petition and all other pleadings in rule making matters should be filed.

47. The petition "shall set forth the text or substance of the proposed rule * * * together with views, arguments and data deemed to support the action requested * * *." 47 CFR 1.401(c). This is important, for unless statements supporting or opposing your proposal are filed, you are afforded no further opportunity, prior to Commission action on the petition, to explain or justify your proposal.

48. When a petition for rule making is received, it is given a file number (such as RM–1000) and public notice of its filing is given. The public notice briefly describes the proposal and invites interested persons to file statements supporting or opposing it. Statements must be filed within 30 days after the notice is issued and must be served on the petitioner, who may reply to such a statement within 15 days after it is filed. The reply must be served on the person who filed the statement to which the reply is directed.

49. If a petition for rule making is repetitive or moot or for other reasons plainly does not warrant consideration by the Commission, it can be dismissed or denied by the Chief of the Broadcast Bureau. See 47 CFR 0.280(bb). In that event, petitioner may file an application for review of the Bureau Chief's action by the Commission. See 47 CFR 1.115. In most cases, however, the petition for rule making is acted on by the Commission. Action is ordinarily deferred pending passage of the time for filing statements and replies. Where the changes proposed obviously have (or lack) merit, however, action may be taken without waiting for the submission of statements or replies. In acting on a petition for rule making, the Commission will issue (1) an order amending the rules, as proposed or modified, or (2) a notice of rule making proposing amendment of the rules; as proposed or modified, or (3) an order denying the petition. In the event of adverse action by the Commission, you may petition for reconsideration (47 CFR 1.106).

RULEMAKING WITHOUT PRIOR NOTICE AND PUBLIC PROCEDURE

50. Rule making proceedings are conducted under Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. See also, 47 CFR 1.411–1.427. Section 4 provides that an agency may make rules without prior notice and public procedure in any of the following circumstances:

(a) Where the subject matter involves a military or foreign affairs function of the United States.

(b) Where the subject matter relates to agency management or personnel or to public property, loans, grants, benefits or contracts.

(c) Where the rules made are interpretative rules, general statements of policy, or rules of agency organization, procedure or practice.

(d) Where the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

The rules of organization practice and procedure (47 CFR, Parts 0 and 1) are rather frequently amended, often without prior notice and public procedure. However, prior public comment is requested if the matters involved are particularly significant or there is doubt or controversy concerning the wisdom, precise effect or details of the rule. Where notice is omitted pursuant to (d) above, it is in circumstances where the effect of the rule could be undermined by actions taken during the period allowed for comment, where the rule merely repeats the provisions of a statute, where the provisions of the rule are beneficial to all and there is no reason to expect unfavorable public comment, or in other similar circumstances constituting good cause under the statute. The other exceptions to the requirement of prior notice are of lesser importance.

51. If you are dissatisfied with a rule made by the Commission without prior notice, you may file a petition for reconsideration. You may also request that the effect of the rule be stayed pending action on your petition. All orders changing the Commission's rules are published in the Federal Register, and the 30-day period for filing the petition for reconsideration runs from the date of publication.

RULEMAKING WITH PRIOR NOTICE AND PUBLIC PROCEDURE

52. Except in circumstances listed in paragraph 50 above, the Commission is required to give prior notice and to afford an opportunity for public comment before making or changing a rule. If you have something to say concerning the proposed rule, you are entitled to file comments. Notice is given by issuance of a Notice of Proposed Rule Making, and by publishing that notice in the Federal Register. The text of the proposed rule is usually set out in the notice. On occasion, however, the notice will instead indicate the subject involved and the result intended, leaving the precise method for obtaining that result to a later stage of the proceeding following consideration of public comment. Whether or not the text is set out, the notice contains an explanation of the proposed rule and a statement both as to the Commission's reasons for proposing the rule and its authority to adopt it. The notice also lists the dates by which comments and reply comments should be submitted and states whether there are limitations on Commission consideration of non-record communications concerning the proceeding.[10] Requests for extension of the time allowed for filing comments and reply comments may be filed.

[10] In rule making proceedings which involve "conflicting private claims to a valuable privilege", fairness precludes non-record communication between Commission personnel involved in making a decision and interested persons concerning the merits of the proceeding. *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 221, 224. In such proceedings, limitations on communication with the Commission are stated in the Notice of Proposed Rule Making.

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53. Rule making proceedings are relatively informal. When a Notice of Proposed Rule Making is issued, the proceeding is given a docket number (such as Docket No. 15000). Papers relating to the proceeding are placed in a docket file bearing this number. This file is available for inspection in the Commission's Public Reference Room in Washington, D.C. Because comments and reply comments are sometimes filed by hundreds of persons, the Commission does not require that copies be served on others. To find out what others have said in their comments, you may inspect the docket file or arrange with a private firm (for a fee) to furnish copies of comments filed in the proceeding. See 47 CFR 0.465. Often, those who have filed comments will furnish copies as a courtesy upon request. All papers placed in the docket file are considered by the Commission before taking final action in the proceeding. To assure that your views are placed in the docket file and considered by the Commission, all comments, pleadings and correspondence relating to the proceeding should (in the caption or otherwise) show the docket number.

54. The rules require that an original and 14 copies of comments be filed, that they be typed, double-spaced, timely filed, and so forth. See, e.g., 47 CFR 1.419. As a practical matter, it is important for you to meet these requirements. The 14 copies are needed for distribution to Commissioners and members of the staff involved in making a decision. If you submit only an original, it will be placed in or associated with the docket file and considered by the staff member assigned to write a decision but probably will not be seen by other Commission officials. Handwritten communications are also placed in the docket file and so considered. You should appreciate, however, that you are more likely to get your point of view across to the persons making the decision if your presentation is typewritten. In making a rule, the Commission is interested in getting as much information and the best thinking possible from the public before making a decision and does not reject comments on narrow technical grounds. However, failure to comply with the filing requirements adversely affects your *right* to have the comments considered and to complain if they do not receive what you consider to be full consideration.

55. The comments should explain who you are and what your interest is. They should recite the facts and authority which support your position. They should not ignore facts and authorities which tend to support a different position, but should deal with them and demonstrate that the public interest requires that the matter be resolved as you propose. They should be carefully worded and well organized and free of exaggeration or vituperative comment. They should be explicit. If the details of the proposed rule or one of several provisions only are objectionable, this should be made clear. Counter-proposals may be submitted. If the rule would be acceptable only with certain safeguards, these should be spelled out, with the reasons why they are needed.

56. In rule making proceedings, the Commission's responsibility is to make a policy judgment and, in making that judgment, to obtain and consider comments filed in the proceeding. It may tap other sources of information. Unless otherwise expressly stated in the notice,[11] staff

[11] See footnote 10 above.

members working on the proceeding are generally prepared to meet with and discuss the proposed rule with anyone who is sufficiently interested. They may initiate correspondence or organize meetings to further develop pertinent information and ideas. They will utilize information available in the Commission's files and draw upon the knowledge and experience of other Commission personnel or of other Government agencies. Generally, the Commission hears oral argument only in rule making proceedings involving policy decisions of the greatest importance. However, you may request the Commission to hear argument in any proceeding, and that request will be considered and ruled upon. When argument is heard, interested persons appear before the Commissioners, orally present their views, and are questioned by the Commissioners. Other devices, such as panel discussions, have, on occasion, been used to further develop the information and ideas presented. An evidentiary hearing is not usual in rule making proceedings. Nevertheless, if you think the circumstances require an evidentiary hearing, you are entitled to ask that one be held.

57. After comments and reply comments and the record of oral argument (if any) have been reviewed, a policy judgment is made and a document announcing and explaining it is issued. There are a number of possibilities. The proposed rules may be adopted, with or without changes. They may be adopted in part and, in that event, further comment may be requested on portions of the proceeding which remain. The Commission may decide that no rules should be adopted or that inadequate information has been obtained and, thus, either terminate the proceeding or issue a Further Notice of Proposed Rule Making requesting additional comment on particular matters. If final action as to all or any part of the proceeding is taken, the final action taken is subject to reconsideration (47 U.S.C. 405).

PETITION FOR WAIVER OF A RULE

58. Except as they implement mandatory statutory provisions, all of the Commission's rules are subject to waiver. 47 CFR 1.3. If there is something the rules prohibit which you wish to do, or if there is something the rules require which you do not wish to do, you may petition for waiver of the rules in question. The petition must contain a showing sufficient to convince the Commission that waiver is justified on public interest grounds (that is, the public interest would be served by not applying the rule in a particular situation) or, in some instances, on grounds of hardship or undue burden.

Reference Materials

59. Laws relating to communications have been compiled in Title 47 of the United States Code, which is available in most libraries. The basic law under which the Commission operates is the Communications Act of 1934, as amended, 47 U.S.C. 151–609. A pamphlet containing the Communications Act, the Administrative Procedure Act, and other statutory materials pertaining to communications may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, for $2.55. Ask for the "The Communications Act of 1934" and "Packets 1–5". The pamphlet, with the

packets of revised pages, shows all changes in the Act through January 1969.

60. The Commission's Rules and Regulations have been compiled in Chapter I of Title 47 of the Code of Federal Regulations, which is available in many libraries. Chapter I is divided into four subchapters, which are printed in separate volumes, which may be purchased separately from the Superintendent of Documents. Those wishing to participate in broadcast matters will need two of these volumes:

Subchapter A—General—$1.75

Subchapter C—Broadcast Radio Services—$1.75

These volumes are revised annually.

61. The Commission's Rules may also be purchased from the Superintendent of Documents in looseleaf form on a subscription basis. The rules are divided into 10 volumes, each containing several related parts. Each volume may be purchased separately. The purchase price includes a subscription to replacement pages reflecting changes in the Rules until such time as the volume is revised. Those wishing to participate in broadcast matters will need two of these volumes:

Volume I—containing Parts 0, 1, 13, 17 and 19—$4.50

Volume III—containing Parts 73, 74, 76 and 78—$10.50

62. All documents adopted by the Commission which have precedential or historical significance are published in the FCC Reports, which are available in some libraries. The Reports are usually published weekly in pamphlet form. The pamphlets are available from the Superintendent of Documents on a subscription basis and are subsequently compiled and published in bound volumes. The annual subscription price for the weekly pamphlets is $14.00. The cost of the bound volumes varies.

63. A list of the Commission's Printed Publications (with prices) will be furnished by the Commission on request.

F.C.C. 72D-48

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CHANNEL TWO THIRTY SIX, INC., SAN BERNARDINO, CALIF. For a Construction Permit	Docket No. 19063 File No. BPH-6150

APPEARANCES

Julian P. Freret on behalf of Major Market Stations, Inc.; *Edward R. Wholl, Morton L. Berfield* and *David Meyers* on behalf of Newell Broadcasting System, Inc.; *Seymour M. Chase* on behalf of Manuel G. Martinez; *Reed Miller* and *David H. Lloyd* on behalf of Dick Clark Television Productions, Inc.; *George R. Borsari, Jr.* and *Leonard S. Joyce* on behalf of KIPPCO and Channel Two Thirty Six, Inc.; and *Virgil Tacy* and *Katherine Savers McGovern* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued July 17, 1972; Effective Date September 6, 1972; pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By Order released October 28, 1970, the applications of Major Market Stations, Inc., Newell Broadcasting System, Inc., Manuel G. Martinez, Dick Clark Television Productions, Inc. and KIPPCO were consolidated for hearing. By Order of the Examiner released June 29, 1971 the Martinez application was dismissed. By Order of the Examiner released April 5, 1972, all of the remaining applications except that of Newell were dismissed, and the name of the Newell applicant was changed to Channel Two Thirty Six, Inc. The stock of the new applicant was shared between Major Market, Newell and KIPPCO. These actions rendered moot all of the designated issues except those going to the financial qualifications and community ascertainment efforts of the surviving applicant.

2. Compliance was had with the statute and rules governing the publication of notice of hearing. Conferences were convened on December 8, 1970, March 11 and April 8, 1971, and April 12, 1972. Hearing was held and the record was closed on July 6, 1972. The parties waive the right to file Proposed Findings of Fact.

FINDINGS OF FACT

3. The applicant will require approximately $115,000 to construct its station and operate it for one year. To meet this need it will have

available approximately $120,000 in stock subscriptions and some $21,000 in equipment credit.

4. Channel Two Thirty Six, Inc. relies on the community contacts made on behalf of the original applicants which subsequently acquired its stock, plus additional contacts made on its own behalf. Viewed as a whole, its contacts reasonably cover a representative sampling of the significant groups in the area. It has reasonably evaluated the comments of the interviewees, and has designed programming reasonably responsive to their suggestions.

CONCLUSIONS

5. The applicant has satisfied the financial and Suburban issues remaining against it. Its other qualifications having been previously established in the processing evaluation of the original applications, the public interest would be served by a grant.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.276, the application of Channel Two Thirty Six, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, Jr., *Hearing Examiner.*

F.C.C. 72R-258

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of ANDREW J. CREVOLIN (KAJC-TV), STOCKTON, CALIF. For Extension of Completion Date	Docket No. 19532 File No. BMPCT-7362

APPEARANCES

Seymour M. Chase, on behalf of Andrew J. Crevolin; and *Gerald M. Zuckerman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 20, 1972; Released September 22, 1972)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND KESSLER.

1. By Order, FCC 72-567, released July 5, 1972, the Commission designated the application of Andrew J. Crevolin for an extension of time within which to complete construction of Station KAJC-TV, Channel 58, Stockton, California, for oral argument before the Review Board on the following issue:

To determine whether the reasons advanced by the permittee in support of its request for an extension of its completion date, constitute a showing that failure to complete construction was due to causes not under the control of the permittee, or constitute a showing of other matters sufficient to warrant a further extension of time within the meaning of Section 319(b) of the Communications Act of 1934, as amended, and Section 1.534(a) of the Commission's Rules.[1]

Oral argument was held before a panel of the Review Board on August 31, 1972. The Board has considered the entire record in the present proceeding and believes that on the basis of the principles governing the disposition of applications for extension of permits which have been established by the Commission, a further extension of time is unwarranted.

2. The Commission's designation Order, *supra*, succinctly sets forth the chronology of events prior to designation and, therefore, no further discussion of the history of this proceeding will be included than is necessary for understanding the present disposition. Crevolin was initially granted a construction permit on May 4, 1970, with comple-

[1] Section 319(b) reads as follows:
Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.
Section 1.534(a) reads in pertinent part as follows:
. . . Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

tion of construction required by January 4, 1971. On December 7, 1970, Crevolin filed an application (BMPCT–7275) for an extension of time to complete construction, alleging changes in economic conditions and personal health problems. The application was granted on December 17, 1970, and in order to provide an 18-month period of time to construct,[2] a completion date of November 4, 1971, was specified. On that date, Crevolin filed the present application for extension of time within which to complete construction. As justification therefor, Crevolin stated that in light of his "health condition, and the advice of his physician," he had concluded that he could not go forward with the project and had therefore entered into an agreement for assignment of his permit. Crevolin also indicated that a copy of the agreement would be filed shortly, as well as an application for assignment. On May 8, 1972, Crevolin submitted an amendment which stated that a copy of the agreement for the assignment of the permit had been filed with the Commission on December 6, 1971, and that the assignee was in the process of securing an option for the proposed transmitter site and preparing a survey of community needs. However, no application for assignment of the construction permit was filed and construction of Station KAJC–TV did not commence. Accordingly, the Chief, Broadcast Bureau, dismissed the extension application, cancelled the construction permit and deleted the call sign.[3] At the same time, Crevolin was advised that he could request reinstatement of his authorization within thirty days and thereby obtain a hearing on his application. Subsequently, on June 8, 1972, Crevolin filed such a request and the Commission Order, *supra*, designating the extension application for oral argument before the Review Board followed.

3. By Order, FCC 72R–207, released August 7, 1972, the Review Board scheduled oral argument for August 31, 1972. Subsequently, on August 23, 1972, Crevolin's attorney filed a Withdrawal of Appearance of Counsel, and on August 27, 1972, Crevolin informed the Review Board by telephone that he would either appear personally or notify the Board that he would not appear. Finally, on August 30, 1972, the Review Board received a letter from the applicant, in which he requested a continuance of argument for thirty days and also stated that he "had been misled by [his] attorney in believing that he had sold the permit for KAJC–TV last November and that he was in the process of transferring this permit." The letter also contains the statement by Mr. Crevolin that his "health does not permit [him] to continue with plans for the building of KAJC–TV" and includes a copy of a doctor's statement, dated November 1, 1971, in which the doctor states that Mr. Crevolin's "diabetic condition is under relatively satisfactory control" but that "tension of any kind upsets him greatly". At the oral argument, neither Mr. Crevolin nor anyone representing him appeared. Counsel for the Chief, Broadcast Bureau did appear.

4. From the above it is apparent that the permittee has not provided sufficient allegations to justify a continuance of the oral argument. The only excuse proffered by the applicant in his belated request is that

[2] See the Commission's *Report and Order*, 23 FCC 2d 274, 19 RR 2d 1578 (1970), amending Section 1.598 of its Rules and extending from eight to 18 months the time in which a permittee may complete construction of his proposed television station.

[3] This action was taken pursuant to Section 0.281(z) of the Commission's Rules.

it would be "impossible" to be present at the oral argument, and the physician's statement accompanying Crevolin's August 30 letter is the same statement submitted with his initial request for extension, and is approximately eleven months old. Thus, the applicant's failure to appear at oral argument constituted a default, and the application warrants dismissal on that ground alone. *Cf. Beta Television Corp.* (*WBBU–TV*), 27 FCC 2d 761, 20 RR 2d 802 (1970). However, we have examined the circumstances here and have determined that there is no basis for grant of the requested extension of construction in any event. Commission precedent clearly holds that such an extension may be granted "consistent with the public interest in the expeditious inauguration of service, upon one of two grounds: The applicant must demonstrate either that the construction was delayed by unforeseen circumstances beyond his control, or that other matters outweigh the harm caused by delay in construction." *John J. Tibiletti* (*KAVU*), 28 FCC 2d 493 at 496, 21 RR 2d 598 at 601 (1971); *Northeast TV Cablevision Corp.* (*WNEC*), 21 FCC 2d 442, 18 RR 2d 333 (1970); *Onondaga UHF–TV, Inc.* (*WONH*), FCC 70–100, 18 RR 2d 270 (1970). Crevolin has not shown that failure to construct was due to causes not under his control. The only allegation in this regard relates to Crevolin's health and is supported only by the physician's letter dated November 1, 1971. However, it is to be noted that not only is this letter not current and of no practical weight, but that the letter was before the Commission when it considered Crevolin's request for reinstatement and the Commission then stated that Crevolin had "failed to demonstrate that he had exercised due diligence in the prosecution of construction or that construction had been prevented by causes not under his control. . . ." Thus, while Crevolin's initial failure to construct within the time required over a year and a half ago may have been due, in part, to circumstances beyond his control, his health problems cannot justify such failure over an indefinite period of time. The Board must conclude that the permittee clearly has not satisfied this criterion. Nor do we find any adequate justification for concluding that Crevolin has established "other matters" sufficient to warrant a grant of his application. While the Commission has, in the past, favorably considered recoupment by a permittee-assignor of out-of-pocket expenses where there is an assignee who has made a firm commitment to construct, such is not the case here. Rather, here there appears to be no evidence of an assignment of the construction permit in the near future. Since the applicant has presented no other circumstances which support a grant of his application, it must be concluded that the public interest would not be served by such a grant, and the application will be denied. See *Continental Summit Television Corp.* (*KGSL–TV*), 27 FCC 2d 945, 21 RR 2d 345 (1971).

5. ACCORDINGLY, IT IS ORDERED, That the application filed by Andrew J. Crevolin for extension of time to construct Station KAJC–TV, Stockton, California (File No. BMPCT–7362), and the request to postpone the date of oral argument, contained in the permittee's letter of August 30, 1972, ARE DENIED, and the television construction permit and call letters ARE CANCELLED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON, *Member, Review Board.*

F.C.C. 72-816

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (MODESTO, MANTECA, TURLOCK, AND PATTERSON, CALIF.; ALBUQUERQUE, N.M.; CENTERVILLE, IOWA; AND MILFORD, DELAWARE)	Docket No. 19297 *RM-1611*, RM-1612, RM-1622, RM-1625, RM-1661

MEMORANDUM OPINION AND ORDER

(Adopted September 13, 1972; Released September 19, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. The Commission has before it for consideration the petition for reconsideration by Kula Broadcasting Corporation (Kula Broadcasting), licensee of AM Station KGMS, Sacramento, and FM Station KSFM, Woodland, California, as to that portion of the Second Report and Order in this docket, adopted June 1, 1972 (35 F.C.C. 2d 230, 230–2), assigning Channels 244A and 272A to Modesto and Manteca, California, respectively. No opposition to the petition was filed.

2. In support of the petition for reconsideration, Kula Broadcasting requests that the channel assignments to Modesto and Manteca referred to above be reversed or that Channel 261A rather than 272A be assigned to Manteca. Kula Broadcasting seeks this relief because it filed an application to change the transmitter site of Station KSFM (Channel 273), and increase antenna height and power. In this respect, it had agreed with Kelly Broadcasting Company to lease the transmitter and other equipment of Station KCTC located at Station KCRA–TV's auxiliary transmitter. By letter, dated June 28, 1972, the Broadcast Bureau advised the petitioner that the proposed transmitter site would be short-spaced by approximately 9 miles to the Manteca reference point. The petition for reconsideration also recites Kula Broadcasting's efforts to acquire an FM facility to serve the Sacramento Standard Metropolitan Statistical Area (SMSA).[1] Kula asserts that Station KSFM from the KCTC site would continue to serve all the area and population presently served while doubling or tripling its present coverage. It further asserts that at its present site power and height increases in the southerly direction are foreclosed, while mountainous terrain west of Woodland is virtually unpopulated.

3. Petitioner points to the Second Report and Order as indicating that the channels assigned to Manteca or Modesto are interchangeable

[1] The SMSA, population 803,149, consists of Sacramento (636,137), Placer (76,218), and Yolo (90,794) Counties. The city of Sacramento, population 257,149, has 8 FM stations, 6 AM stations, and 1 educational FM station. In Placer County, there are AM and FM Stations at Auburn (population 6,570) and Roseville (population 17,895). In Yolo, Station KSFM operates at Woodland, population 20,677; Davis, population 23,488, is served by an educational FM station.

and that the choice was made because a station operating on Channel 244A at Manteca would have to operate from a point approximately 4 miles south and east of that community, whereas a station operating on Channel 272A at Manteca would not. Petitioner also points out that Channel 261A might be assigned to Manteca, but the transmitter would have to be sited 6.5 miles north and east of the city in order to protect Station KBAY, San Jose.

4. As Kula Broadcasting points out, the only reason for having made the assignments the way we did was to avoid having to site a Manteca station at other than the reference point. However, since it appears that the assignments to Manteca and Modesto in this manner would prevent Kula Broadcasting from filing an application for change of transmitter site, increase of height and power there is no reason why the interchange of channels should not be made. Accordingly, we deem it in the public interest to grant the petition for reconsideration. Authority for the adoption of the amendments made is contained in Sections 4(i), 303(g) and (r), 307(b), and 405 of the Communications Act of 1934, as amended.

5. In accordance with the foregoing, IT IS ORDERED, That, effective October 31, 1972, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED with respect to the cities listed below:

City:	*Channel No.*
Modesto, Calif	272A, 277, 281
Manteca, Calif	244A

6. IT IS FURTHER ORDERED, That the petition of Kula Broadcasting Corporation IS GRANTED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-820

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (BALLSTON SPA, N.Y.)	Docket No. 19498 RM-1796

REPORT AND ORDER

(Adopted September 13, 1972; Released September 19, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT.

1. The Commission has before it for consideration the Notice of Proposed Rule Making, released May 12, 1972 (FCC 72-407), proposing an amendment of Section 73.202(b) of the Rules, the Table of FM Assignments, by assigning an FM channel to Ballston Spa, New York.

2. The rule making proceeding was instituted on a petition filed by Paul F. Godley, Jr. for an assignment of Channel 244A to Ballston Spa. The Notice pointed out that Ballston Spa, a community of 4,968 persons and a county seat, had no local broadcast station, and that Saratoga County, in which it is located, had one AM and one FM station at Saratoga Springs and an AM station at Mechanicville. It also stated that the proposed assignment to Ballston Spa would preclude future assignments only on Channel 244A, and that the communities within the precluded area where a channel could be assigned have at least an AM or an FM station assignment or both.

3. In its comments, Community Radio of Saratoga Springs, New York, Inc. (Community Radio), licensee of Stations WKAJ and WKAJ-FM, Saratoga Springs, New York, states that its stations, located in an adjoining community some five miles from Ballston Spa, are programmed to serve not only the needs of Saratoga Springs but also those of nearby communities including Ballston Spa; that stations' newscasts regularly carry items which concern the Saratoga County region and Ballston Spa; and that WKAJ broadcasts a daily newscast devoted specifically to Ballston Spa at 2:00 p.m. Community Radio contends that the stations attempt to cover local events concerning Ballston Spa such as play-by-play coverage of the high school football games, public service announcements, school closing information, special programs dealing with issues such as school bond issue, local elections, and similar local events. It states that WKAJ has a weekly call-in program which has featured community leaders from Ballston Spa discussing issues facing that community. In reply, Godley states that a non prime-time afternoon news broadcast, five or six high school broadcasts per year and occasional participation in a once per week call-in program could hardly be considered evidence of service to Ball-

ston Spa, and that needs of a community cannot be met by programming from a station in another city.

4. Although it has been shown that an AM and an FM station in a neighboring community are providing service with some programming directed to Ballston Spa, it appears that the public interest would be served to provide the community with an opportunity to acquire a first broadcast outlet for local expression. Ballston Spa is the county seat and is located in a county which has grown rapidly within the last decade. An FM channel assignment here would thus provide for a local station which could broadcast programs directed toward meeting the special needs, interests and problems of Ballston Spa and the surrounding area. We will therefore assign Channel 244A to Ballston Spa, New York.

5. The authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, That effective October 31, 1972, the Table of FM Assignments (Section 73.202(b) of the Rules) IS AMENDED by the addition of the following:

	Channel No.
City: Ballston Spa, N.Y.	244A

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of LEROY GARRETT, TRADING AS GARRETT BROADCASTING SERVICE (WEUP), HUNTSVILLE, ALA.	Docket No. 19258 File No. BP-18295
WRBN, INC. (WRBN), WARNER ROBINS, GA.	Docket No. 19259 File No. BP-18409

MEMORANDUM OPINION AND ORDER

(Adopted September 19, 1972; Released September 20, 1972)

BY THE REVIEW BOARD:

1. Following the Examiner's denial on June 27, 1972,[1] of its Motion to Correct Transcript, Leroy Garrett, tr/as Garrett Broadcasting Service, filed on June 30, 1972, an Appeal from Examiner's Order and Request for Alternative Relief which along with the Broadcast Bureau's Opposition, filed July 10, 1972, is now before the Board. The Examiner has not authorized an appeal to be taken from his ruling; therefore, the appeal must be dismissed pursuant to the provisions of Section 1.30(b) of the Rules. Petitioner has given no adequate reasons for granting his motion if it be treated as a petition to reopen the record. The Examiner properly denied a similar motion in his Order of May 1, 1972 (FCC 72M-567) from which no appeal was taken.

2. IT IS ORDERED, That Leroy Garrett's Appeal from Examiner's Order and Request for Alternative Relief IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] FCC 72M-828.

F.C.C. 72-834

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AN APPLICATION FOR CERTIFICATE OF COMPLIANCE FILED BY HAMPTON ROADS CABLEVISION CO., NEWPORT NEWS, VA.	CAC-59

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. Hampton Roads Cablevision Company operates a 12-channel cable television system at Newport News, Virginia, which is within a major television market (Norfolk-Newport News-Portsmouth-Hampton, Virginia, #44), and has applied for a certificate of compliance to add two distant television signals to its carriage of television broadcast signals.

2. The following signals are now carried by the system:

WAVY-TV (NBC, Channel 10), Portsmouth, Virginia.
WYAH-TV (Ind., Channel 27), Portsmouth, Virginia.
WTAR-TV (CBS, Channel 3), Norfolk, Virginia.
WVEC-TV (ABC, Channel 13), Hampton, Virginia.
WHRO-TV (Educ., Channel 15), Hampton, Virginia.
WCVE-TV (Educ., Channel 23), Richmond, Virginia.
WXEX-TV (ABC, Channel 8), Richmond, Virginia.
WTUR-TV (CBS, Channel 6), Richmond, Virginia.
WWBT (NBC, Channel 12), Richmond, Virginia.

Hampton Roads Cablevision requests certification of its proposal to add these signals:

WTTG (Ind., Channel 5), Washington, D.C.
WDCA-TV (Ind., Channel 20), Washington, D.C.

Upon certification and installation of the microwave relay system required to deliver these Washington, D.C. signals to Newport News, the three network affiliates licensed to Richmond will be deleted from the system.

3. The Commission authorized the carriage of these Richmond stations on an experimental basis in *Hampton Roads Cablevision*, FCC 71-1199, 32 FCC 2d 560 (1971). Run-of-the-contract exclusivity was extended by the system to local television stations for their motion pictures before our new cable television rules were adopted, and regular monthly reports have been filed with the Commission. Both the Commission and Hampton Roads Cablevision contemplated that this experimental carriage would terminate when the system obtained distant signals pursuant to the new rules.

4. The addition of two distant independent signals from Washington, D.C. satisfies the signal carriage requirements of § 76.61(b)(2).

Therefore, we shall certify the carriage of the two Washington stations and permit the deletion of the three Richmond, Virginia network affiliates at such time as the necessary microwave links have been completed.

Accordingly, IT IS ORDERED, That the captioned application for certificate of compliance filed by Hampton Roads Cablevision Company IS GRANTED.

IT IS FURTHER ORDERED, That carriage of the signals of Richmond, Virginia television stations WWBT, WTVR–TV, and WXEX–TV, as authorized by the Commission on November 24, 1971, WILL BE TERMINATED upon completion of the microwave facilities required to relay the signals of Washington, D.C. television stations WTTG and WDCA–TV to Hampton Roads Cablevision Company, Newport News, Virginia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-844

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) ON BEHALF OF STATION KSL-TV, SALT LAKE CITY, UTAH, ON THREE DATES IN LATE SEPTEMBER 1972.

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 22, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING; COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. The Commission here considers a letter request for waiver of the prime time access rule, Section 73.658(k) of the Commission's Rules, filed on September 14, 1972, by KSL, Incorporated, licensee of Station KSL-TV, Salt Lake City, Utah (CBS-affiliated). The request is for waiver of the limitation to three hours of network programming each evening during prime time, for three dates in September 1972: September 21, 22 and 28. On these evenings, the CBS movie will run some 20 minutes beyond its usual length of two hours, and in addition the network will present a 5-minute political broadcast. In the rest of the United States, this presents no problem under the rule, since the overrun beyond the usual two hours occurs after the end of prime time; but it does present a problem in the Mountain time zone for stations observing 7–11 p.m. (M.T.) as prime time. There, the overrun occurs between 10:00 and 10:25 p.m., and means that, with an early hour of network programming in addition to the movie, KSL-TV would present 3 hours and 25 minutes of CBS material on these evenings. Waiver accordingly is sought.

2. The situation here is similar to those involving NBC and CBS movie runovers earlier this year, in which cases we have granted waiver to KSL-TV and more often to the NBC station, KUTV.[1] Waiver appears appropriate in the present cases also, for the same reasons. We expect that the change in the rules which goes into effect October 1, designating the 6–10 period as prime time in this zone, will obviate these problems for the future.

3. In view of the foregoing, IT IS ORDERED, That waiver of Section 73.658(k) of the Commission's Rules IS GRANTED to Station KSL-TV, Salt Lake City, to present up to 3½ hours of CBS programs on September 21, September 22, and September 28, 1972.

FEDERAL COMMUICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] See, for example, *Station KUTV*, 34 FCC 2d 404 (March 1972); *Station KSL-TV*, 33 FCC 2d 587 (February 1972).

F.C.C. 72-837

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of SPANISH INTERNATIONAL COMMUNICATIONS CORP. (KFTV), HANFORD, CALIF. For License to Cover Construction Permit	File No. BLCT-2168

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. We have before us for consideration: (a) the application (BLCT-2168) filed by Spanish International Communications Corporation (Spanish International) for license to cover construction of television broadcast station KFTV, channel 21, Hanford, California, and request for waiver of our satellite station policy; (b) a petition to designate the application for hearing, filed August 31, 1972, by Tel-American Corporation (Tel-American), licensee of television broadcast station KAIL, channel 53, Fresno, California; and (c) an opposition, filed September 1, 1972, by Spanish International.

2. Spanish International acquired the permit for station KFTV by assignment (BAPCT-426, BAPTS-86) on March 19, 1969. At the time, it was contemplated that the station would operate as a local, full-time, Spanish-language facility with programs directed to the needs of the service area. Spanish International now proposes and seeks authority to operate as a satellite of commonly owned station KMEX-TV in Los Angeles, a deviation from general Commission policy. In support of its request, Spanish International states that since the acquisition, unfavorable economic conditions require an initial period of satellite operation in order to establish the station and to keep costs in line with anticipated revenues. Spanish International asserts, in this connection, that it had originally estimated operating expenses at $236,000 per year with revenues at $250,000, but that the cost figures are now much higher with no corresponding increase in revenues, and the viability of a full-scale operation would be threatened. Spanish International undertakes to construct main studios in Hanford during this initial period of twelve months and will provide locally oriented programming to meet the needs of the Spanish-speaking communities in Hanford and the San Joaquin Valley. Spanish International proposes to provide this programming by hiring a full-time newsman/cameraman to cover local news in Hanford and the San Joaquin Valley. These news items will be shipped to Los Angeles, to be broadcast on the 6:00-7:00 p.m. KMEX-TV weekday newscast. In addition, it is proposed to air from Los Angeles a special five-minute newscast Mon-

day thru Friday dedicated solely to local Hanford-San Joaquin Valley news and to tape locally and telecast via KMEX–TV a weekly 15-minute program with community leaders from the area dealing with the particular problems affecting the Spanish-speaking population.

3. On August 31, 1972, Tel-America Corporation (Tel-America) licensee of television broadcast station KAIL–TV, channel 53, Fresno, California, filed a petition to designate the KFTV license application for hearing. Inasmuch as a petition does not lie against an application for license under section 319 of the Communications Act, we are treating it as an informal objection pursuant to the provisions of section 1.587 of the Commission's rules. Tel-America, in substance, urges that KAIL–TV and KFTV compete in the same market area and that the proposed satellite operation would have an unfair competitive advantage. This, in turn, could have a substantial impact upon KAIL–TV's operation resulting in reduction or abandonment of its Spanish-language programming. Tel-America further asserts that it is the only station serving the Mexican-American community with the major part of its schedule. Tel-America urges that Spanish International is simply trying to invade the Fresno market and that the Commission should require Spanish International to build and operate local studios in Hanford immediately.

4. Spanish International, in its opposition, contends that Tel-America's petition is without factual recitations supporting the allegations of economic injury. Spanish International also argues that the petition is untimely and that the question ought to have been raised when it filed an application for additional time to construct (BMPCT–7343) granted December 30, 1971, wherein Spanish International indicated its intent to operate on a satellite basis for 12 to 18 months. Spanish International also urges that the Commission has waived its policy in similar situations as appropriate for the kind of "start up" operation proposed by Spanish International, citing *Basin TV Co.* (*KBAS–TV*), 13 RR 392; *Voice of the Caverns, Inc.*, 4 FCC 2d 946; *Mid-Continent Broadcasting Co. of Wisconsin, Inc.*, 12 FCC 2d 111; and *WFRV, Inc.*, 17 FCC 2d 437. Finally, Spanish International contends that section 319 requires grant of a license unless circumstances or causes first coming to the attention of the Commission since the granting of the permit would, in the Commission's judgment, make the operation against the public interest. Spanish International urges that the matter of satellite operation was passed upon the Commission in granting the extension application in December of 1971.[1]

5. As Spanish International clearly recognizes, its proposed operation is inconsistent with the Commission's policy with respect to local programming. We have, however, permitted deviations in special circumstances where the public interest in a new service was very strong. Indeed, in the *Mid-Continent* case cited above, involving a proposed UHF satellite for La Crosse, Wisconsin, where there was an operating non-satellite VHF station, the Commission justified waiver of its policy because it recognized the competitive difficulties faced by a UHF in a VHF market, and because of the undertaking of Mid-Con-

[1] We reject this contention. In granting an extension the Commission found that the public interest would be served by granting additional time to construct, but it did not approve the proposed satellite operation.

tinent to operate as a satellite only for one year. The factual situation before us presents a more difficult case, in that the objector is a UHF station. Nevertheless, KAIL–TV has not supported its conclusions with factual allegations, while failure to grant authority to operate would keep Spanish International off the air and would be inconsistent with our policy of encouraging UHF development. We are of the view that, on balance, the public interest is best served by the issuance of special temporary authority for a period of six months subject to the condition that within that time period Spanish International will construct a main studio in Hanford and will commence local programming. We do not believe that this course of action will stultify the growth of KAIL–TV, and it will permit the initiation of a new UHF service for Hanford and the San Joaquin Valley area directed to the particular needs of the Mexican-American population in the area.

6. To assure compliance, we will withhold action on the license application until the main studio is constructed. We wish to reiterate that this determination does not reflect any intention on the part of this Commission to relax our policies and rules with respect to satellite operations, which are based on public interest considerations and equitable principles. We reaffirm the need to hold stations in the same market to essentially the same standards. But where, as here, a short-term waiver will result in a new service, waiver is clearly warranted.

In view of the foregoing, IT IS ORDERED, That Spanish International Communications Corporation IS GRANTED special temporary authority for a period of six months to operate station KFTV in accordance with facilities specified in BMPCT–7403, as a satellite of station KMEX–TV, Los Angeles, subject to the condition that within that period Spanish International Communciations Corporation will construct a main studio in Hanford and will commence origination of local programs;

IT IS FURTHER ORDERED, That action on the license application be withheld until completion of the main studio in Hanford;

IT IS FURTHER ORDERED, That the request of Tel-America Corporation (KAIL–TV) to designate the license application for hearing IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72D-49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of TROY RADIO INC., TROY, ALA. For a Construction Permit	Docket No. 19407 File No. BPH-7253

APPEARANCES

On behalf of the applicant, Troy Radio, Incorporated, *Roy F. Perkins, Jr.*, Cohn and Marks; on behalf of the applicant, Pike Broadcasting, Inc., *Ray R. Paul* and *James I. Wilson*, Prince & Paul; on behalf of the Broadcast Bureau, *A. Thomas Carroccio*, *Walter C. Miller*, and *Katherine S. McGovern*.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued July 26, 1972; Effective Date: September 15, 1972 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Troy Radio, Incorporated, for construction permit for new FM broadcast station at Troy, Alabama. It was designated for hearing by Order of the Commission released February 1, 1972 (FCC 72-76) for a comparative hearing with the mutually exclusive application of Pike Broadcasting, Inc., for the same facilities. On May 1, 1972, the applicants filed with the Commission Joint Petition for 1. Approval of Agreement; 2. Grant of Application and Dismissal of Competing Application and 3. Authorization to Reimburse Expenses, which proposed the dismissal of the application of Pike Broadcasting and reimbursement of its expenses reasonably and prudently expended. The Joint Petition was granted by the Hearing Examiner by Memorandum Opinion and Order issued July 17, 1972 (FCC 72M-914), thereby rendering the comparative issues moot. The issues remaining in hearing with respect to Troy Radio as designated by the Commission are as follows:

> 1. To determine with respect to the application of Troy Radio, Incorporated:
>
> a. The cost of obtaining the proposed studio/transmitter building, and, to the extent that this costs more than $1,000, the additional funds required by the applicant to construct and operate the proposed station for one year;
>
> b. Whether Mr. Albert G. Goree has sufficient current and liquid assets [in excess] of current liabilities to enable him to meet his commitment to the applicant, or whether the applicant has available other sources of funds to meet its requirements; and
>
> c. Whether, in light of the evidence adduced under the above issues, the applicant is financially qualified.

Conferences were convened on March 10 and June 15, 1972. Hearing was held and the record was closed on July 17, 1962. Proposed findings

of fact in the form of a proposed Initial Decision were filed by Troy Radio Incorporated on July 21, 1972. With the consent of the Broadcast Bureau, the proposed Initial Decision has been adopted.

FINDINGS OF FACT

2. By Petition for Leave to Amend filed February 22, 1972, and Correction to Petition for Leave to Amend filed March 13, 1972, granted by Order of the Examiner released March 14, 1972 (FCC 72M–328) the applicant filed a revised financial plan. The costs proposed under that plan were as follows:

Total construction costs	$78,964
Estimated costs of operation for first year	26,160
Total first year costs to be met by applicant	105,124

To the foregoing must be added $3,000 in reimbursement[1] to be paid the dismissing applicant, Pike Broadcasting, Inc., upon a final dismissal of its application and grant of the application of Troy Radio, Incorporated, under the Joint Petition, *supra*; the total financing required, therefore, for construction and first year operation is $108,124. To meet these costs, the applicant proposed (in Section III as Amended) the following:

Loans (net after first year interest)	$58,330
Revenues	51,745
Credit on building purchase (net after first year payments)	4,519
Credit on equipment purchase (net after first year payments)	38,172
Total available	152,766

3. The loans proposed represent a loan of $59,500 from Albert H. Goree, the father of the president and sole stockholder of the applicant, and a loan of $2,400 from Albert G. Goree, president and sole stockholder of the applicant. The Commission's Hearing Order found that the ability of Mr. Albert H. Goree to make the loan proposed by him had been demonstrated and this was reviewed and confirmed by the Review Board in its Memorandum Opinion and Order released June 19, 1972 (FCC 72R–165).[2] The $2,400 loan represents funds already expended on the application of Troy Radio by Albert G. Goree, president. The credit available on the building purchase and on the equipment was properly supported in the Amendment by statements from the suppliers. The proposed revenues were based on statements from prospective advertisers indicating amounts which they would anticipate spending for advertising over the station during the first year of its operation.

4. With respect to Issue 1(a), the cost of the proposed studio/transmitter building if purchased for cash would be $7,000, but it will be

[1] The $3,000 for payment to Pike Broadcasting, Inc., has been deposited by Troy Radio in escrow for that purpose. Under the agreement between the parties in the Joint Petition, amounts to be reimbursed in excess of $3,000 are not payable for 18 months after grant of the Troy Radio application and, accordingly, do not enter into the determination of Troy Radio's financial qualifications, i.e., its ability to construct and operate for one year.

[2] The figure for the loan used by the Commission and the Review Board was $58,520. The difference is unexplained but it is clear from the financial resources which the Review Board stated Mr. Albert H. Goree had available to meet his loan commitment (Memorandum Opinion and Order, *supra*, Para. 1) that the full $59,500 is available.

available to the applicant for $1,000 down payment and payments of $105.78 per month for ten years. With respect to Issue 1(b), under the amended financial proposal further funds from Mr. Albert G. Goree have been eliminated.

5. As will be observed from paragraph 2, *supra*, to meet its expected costs of $108,124, the applicant has available in cash and credit $101,021.[3] Therefore, the applicant needs an additional $7,103. The applicant submitted Affidavits from four of the potential advertisers from whom statements were submitted in the applicant's amended financial proposal. The Affidavits indicated the basic proposed program format of the station, the rates to be charged for advertising and the fact that each statement of proposed advertising expenditures is exclusively for advertising over the proposed station, separate from and in addition to any other advertising expenditures by the prospective advertiser. Each Affidavit confirmed the previous statement of intention; together they cover expected advertising revenues during the first year of operation totaling $5,600. The applicant's financial plan includes an uncommitted reserve for contingencies in the amount of $2,000. The sum of the revenues represented by the Affidavits of potential advertisers and the reserve for contingencies is $7,600, more than the $7,103 needed from sources other than cash and credit.

CONCLUSIONS

6. Troy Radio, Incorporated, was found by the Commission in the Hearing Order to qualify to receive a grant of its application except as to its financial qualifications. As set forth in the findings, the applicant has demonstrated that it may reasonably expect to have available the cash, credit and advertising revenues necessary to meet its total cost for construction (including the first year payment due to the dismissing applicant) and operation for one year. Accordingly, it is concluded that the applicant is financially qualified.

IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Troy Radio, Incorporated, for a construction permit for an FM broadcast station to operate at Troy, Alabama, on Channel 289 (100 kW(h); 100 KW(V); 412.6 feet) is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

[3] The sum of loans—$58,333, credit on building—$4,519, and credit on equipment—$38,172.

F.C.C. 72-833

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Applications of GERALD T. UHT For a construction permit for a new one-way signaling base station on 158.70 MHz in the Domestic Public Land Mobile Radio Service at Buffalo, New York.	File No. 4634-C2-P-69
NEW YORK TELEPHONE CO. For a construction permit for a new one-way signaling base station on 152.84 MHz in the Domestic Public Land Mobile Radio Service at Buffalo, New York.	File No. 5950-C2-P-(3)-69
POCKET PHONE BROADCAST SERVICE, INC. For modification of construction permit for changes in Station KEA777 a one-way signaling station on 35.58 MHz at Niagara Falls and Aurora, New York.	File No. 8913-C2-MP-70

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 22, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration: (a) Commission decision, May 24, 1972, released May 26, 1972, FCC 72-455, 35 FCC 2d 140; (b) Motion for Stay, filed June 26, 1972 by Pocket Phone Broadcast Services, Inc. (Pocket Phone) and Radio Relay Corp. (Radio Relay); (c) Petition for Reconsideration and for other Affirmative Relief, filed June 26, 1972 by Pocket Phone and Radio Relay; (d) Opposition to Petition for Stay, filed July 3, 1972 by New York Telephone Company (NYTELCO); (e) Opposition to Petition for Reconsideration and for other Affirmative Relief, filed July 7, 1972 by NYTELCO; and (f) Reply to Opposition to Petition for Reconsideration and for other Affirmative Relief, filed July 20, 1972 by Pocket Phone and Radio Relay. Our decision granted the referenced applications and dismissed the Petition to Deny the NYTELCO application filed by Radio Relay.[1] Radio Relay's chief argument was that the filing by NYTELCO, a Bell affiliate, for "guardband" facilities in Buffalo made it proper to consider in an adjudicatory framework

[1] We found in our decision of May 24, 1972 that Radio Relay lacked standing to protest the application of NYTELCO notwithstanding its relationship to Pocket Phone. Nevertheless, we gave full consideration to the issues raised in the pleadings. In the instant proceeding Pocket Phone has joined Radio Relay in seeking reconsideration of our decision.

issues largely identical to those resolved for general applicability in the Docket 16778 rulemaking proceeding which allocated the guard-band frequencies both to wireline and non-wireline carriers. Radio Relay contended that NYTELCO's proposed operation would have an anti-competitive and, perhaps, fatal impact upon the existing and proposed operations of miscellaneous common carriers in the area. We found that Radio Relay, in advancing general allegations against the Bell System, rather than against NYTELCO, had not made the required specific showing of substantial and material questions of fact to show that the situation in Buffalo was likely to differ so significantly from the general situation envisioned in the rulemaking proceeding as to warrant a hearing on these same issues.

2. Pocket Phone and Radio Relay seek reconsideration of the Memorandum Opinion and Order of the Commission, adopted May 24, 1972, and released May 26, 1972 (FCC 73–455, 35 FCC 2d 140) insofar as that decision granted without hearing the above-mentioned application of NYTELCO and dismissed a petition to deny and related pleadings filed by Radio Relay. Petitioners urge that the findings and conclusions in the Commission's decision are erroneous, and ignore or misinterpret the factual allegations advanced. Additionally, the instant petition contains evidence alleged to show that changes have occurred in the Buffalo area which bear directly upon the Commission's public interest determinations.

3. Preliminarily, petitioners argue that the Commission erred in determining that Radio Relay lacked standing to protest the NYTELCO application because it was not a valid "party in interest". Petitioners assert that Pocket Phone's participatory capabilities were hampered because of the pending application for transfer of control which put Pocket Phone in "limbo status". It is contended that Radio Relay was in the process of acquiring control of Pocket Phone and that its proposed commitments to improve and expand the services of Station KEA777 would have been seriously jeopardized by a grant of the NYTELCO application to provide one-way paging service in the same market. It is argued that the entry of a Bell affiliate into a particular market cannot be viewed in isolation. Rather; petitioners contend, a situation such as Buffalo must be viewed as one instance of the cumulative adverse effects upon Radio Relay's efforts to conduct common carrier operations across the country. It is submitted that the Commission, by "procedural nicety", has not accorded Radio Relay full status as a party in interest. Petitioners feel that the Commission, therefore, has not adhered to the spirit of the decision of the Court of Appeals in reviewing the rulemaking proceeding wherein it was stated that the Commission would be expected to consider petitions to deny with due regard to preserving competition.[2] Radio Relay contends that since it is now the transferee of Pocket Phone, and not merely the proposed transferee, it clearly has standing to protest an application which could adversely affect its economic position. Furthermore, it is requested that even if we should determine that petitioners "suffer from procedural flaw to any degree" that we consider the instant petition on its merits as we did the petition to deny.

[2] *Radio Relay Corporation* v. *FCC*, 409 F. 2d 322 (2d Cir. 1969).

4. Radio Relay and Pocket Phone urge reconsideration of our determination that NYTELCO has made a sufficient need showing. It is contending that NYTELCO's need showing fails to comply with Item 52 of FCC form 401 which requires:

> a complete statement, setting forth facts which show how the instant proposal will be in the public interest and will satisfy specified needs for service, detailing the number and activities or prospective customers. . . . If surveys or solicitations have been made, the nature and detailed results thereof should be submitted.

Additionally, it is argued that the showing made by NYTELCO does not meet the standards enunciated in *Long Island Paging*, 30 FCC 2d 405 (Review Board), affirmed 32 FCC 2d 235, and that the Commission, in its determination, relied solely on criteria not considered acceptable under that decision. Petitioners allege that we have made no reasoned analysis of their arguments that the standards set in *Long Island Paging* have not been met. Moreover, Radio Relay and Pocket Phone allege that we have not considered their contention that the present carriers in the market can satisfy all existing and potential demands for service. In support of this contention petitioners request official notice of the five carriers which presently serve the area and the number of one-way units, indicated, served by each. Petitioners also have noted the maximum one-way capacities of several carriers in the area. *Associated Telephone Answering Service*, 7 FCC 2d 143, is cited for the proposition that a hearing is warranted to determine public need for a new station when the applicant (NYTELCO) has not demonstrated that the existing facilities cannot satisfy current demands. Petitioners reiterate their contention that the entry of NYTELCO into the market would have an adverse economic effect on the existing small radio common carriers. Official notice is requested of the losses or modest net profits of the carriers in the market. It is alleged that we have not considered the claim that Station KEA777 has failed to curb losses despite a vigorous subscription effort and that the cause is likely the "depressed economic condition which has plagued the Buffalo area." Official notice is requested of declining census figures for Buffalo and of summaries of area employment developments and 1971 trends in employment, prices, and earnings in the Buffalo area, prepared by State and Federal Department of Labor.

5. Radio Relay and Pocket Phone urge that the Commission reconsider its conclusions concerning the alleged anticompetitive impact that a grant to NYTELCO would have on the existing carriers in the market. Petitioners feel that *United Telephone Co. of Ohio*, 26 FCC 2d 417, is instructive not only to demonstrate that facts showing actual anti-competitive practices will be considered at renewal time, but also that the Commission may order a hearing because of "concern that there *may* be unfair or illegal competitive practice existing between wireline and non-wireline carriers . . ." (emphasis added). Petitioners assert that they have advanced reasonable inferences based on actual market experiences, that the distinction between an applicant for renewal, such as United, and a new applicant is without substance, and that relief should come before and not after the harm occurs. It is contended that the Commission has been constantly aware of the potential for anticompetitive practices when dealing with such communications

giants as broadcast networks [3] or AT&T and its affiliates. Petitioners also reiterate their argument that the TAT–4 decision of the Commission, 37 FCC 1151, and *FTC* v. *Procter & Gamble*, 386 U.S. 568, are analogous in that the Commission and the Supreme Court barred the entry of large corporations into a particular market.

6. Petitioners charge that the Commission has misconstrued its allusions to NYTELCO's telephone service deficiencies. Such deficiencies, it is alleged, demonstrate that NYTELCO is not now fulfilling its obligations to the public in its area of primary service, and that with the addition of another service one or the other must suffer from diluted effort.

7. Radio Relay and Pocket Phone feel that we should have "accorded significant decisional weight" to the Memorandum and Order of the U.S. District Court for the Eastern District of Pennsylvania respecting a complaint by a miscellaneous common carrier in Philadelphia against the Bell System affiliate in Pennsylvania. It is contended that the courts possess greater expertise in such matters where anticompetitive business practices are involved.

8. Petitioners reiterate their request for a hearing and argue that an ample basis to warrant the same has been presented in light of the showing deemed satisfactory in the *United* case, *supra*, the competitive situation between carriers in the Buffalo market, the excess capacity available on existing facilities, the depressed economic state of Buffalo and NYTELCO's inadequate showing of need.

9. Finally, petitioners request that the Commission consolidate for consideration the instant situation with other situations involving petitions to deny, filed by Radio Relay or its subsidiaries against Bell System affiliates seeking guardband facilities in other markets. Such consolidation, it is contended, would allow the Commission to focus on the realistic interrelationship of Bell System affiliates with the immense services and resources of AT&T.

10. In its Opposition NYTELCO contends that Radio Relay and Pocket Phone have raised no new issues nor alleged any new facts which require reopening of this proceeding. NYTELCO asserts that the essence of the petition for reconsideration is set forth at page 5 of that petition:

> If NYTELCO were not a Bell System affiliate at Buffalo, then Radio Relay and Pocket Phone would have no serious concern about its entry into that market assuming it satisfied 'needs' standards.

It is, therefore, NYTELCO's contention that Radio Relay and Pocket Phone are requesting a reversal of the Commission's decision simply because NYTELCO is affiliated with the Bell System. NYTELCO cites *Radio Relay Corp.* v. *FCC*, 409 F. 2nd 322 (2d Cir. 1969), for the proposition that such affiliation is not a ground for denial of an application. Furthermore, NYTELCO argues that the allegations to which the court addressed itself, and which were found insufficient to warrant a hearing, are essentially no different than those reasserted here.

11. NYTELCO alleges that Radio Relay and Pocket Phone, in attempting to reopen the need issue, have offered no new evidence even that the need found by the Commission to exist, does not exist. It is

[3] See *Competition and Responsibility in Network Television Broadcasting*, Docket No. 12782, FCC 72–501, released June 13, 1972.

contended that the petitioners do not dispute the conclusion that NYTELCO has demonstrated a need for at least 9,000 paging units in the Buffalo area, but assert only that NYTELCO should not be allowed to satisfy any part of that need. NYTELCO recognizes that the petitioners are not satisfied that the standards of *Long Island Paging*, *supra*, have been met, but feels that their disagreement is based upon nothing which was not considered in the Order. The petitioners' arguments with respect to need are cited as nothing more than another attempt to keep a Bell System affiliate out of the market. NYTELCO contends that if this were not the case, then the grant of a construction permit for new one-way facilities to Gerard T. Uht at the same time as that to NYTELCO would certainly be disputed. However, NYTELCO points out, Radio Relay and Pocket Phone do not ask for reconsideration of the Commission's grant of Uht's application.

12. In summary, NYTELCO contends that no new issues have been raised in the Petition for reconsideration. NYTELCO feels that petitioners request for consolidation is meritless and "comes long after such a request might have been appropriate in this proceeding." For these reasons NYTELCO requests that the petition for reconsideration be denied in every respect.

13. In their Reply, Radio Relay and Pocket Phone dispute NYTELCO's claim that their case is insubstantial and conclusory. Petitioners contend that they have marshalled facts, drawn parallels with anti-competitive tendencies of other Bell affiliates, and made reasonable inferences warranting the designation of the NYTELCO application for hearing and for consolidating such proceeding with certain others that share common issues of fact and law. Petitioners claim it is illogical and unfair to charge them with the burdens of advancing "specific allegations of facts" at this juncture. NYTELCO, it is alleged, is in a unique position to prove or disprove, at a hearing, the truth of the inferences because of its affiliation with the Bell system. Furthermore, Radio Relay and Pocket Phone contend that a hearing is appropriate to assess the total impact of numerous Bell affiliates into guardband one-way markets. Petitioners deny that they seek reversal of the Commission's decision "simply because NYTELCO is a Bell System affiliate." It is the view of petitioners that the Commission has never considered their contention that the existing carriers in Buffalo can satisfy all forseeable demands for service. They further state at par. 3 of the Reply:

> Even if regular needs standards were satisfied, the entry of a Bell System affiliate into the market to fill such needs raises questions which would not arise with the expansion or entry of a small business concern to provide the same services.

14. Finally, petitioners feel that *Radio Relay Corp.* v. *FCC*, *supra*, made it clear that an evidentary hearing would be warranted if factual inferences of anti-competitive competition could be advanced at the time of a specific guardband application.

15. We have carefully reviewed and reconsidered our memorandum opinion and order of May 24, 1972, herein, in the light of the present petition. In our opinion, the arguments offered by petitioners do not

warrant or require any change in our decision that petitioners' request for a hearing is without substantial basis.

16. Petitoners allege that we have not adhered to the spirit and expectations of the Court of Appeals decision in *Radio Relay Corp.* v. *FCC*, *supra*, in that by not according Radio Relay full status as a party in interest we have not properly considered a petition by a non-wireline company. This position is clearly untenable in view of the determination in our order that "notwithstanding Radio Relay's lack of standing, we will give full consideration to the issues raised in the pleadings" (par. 5). Furthermore, the *Radio Relay* decision did not imply that anyone could file petitions to deny regardless of statutory requirements of standing. Petitioners' contention that we stated a preference in our order that a petition for reconsideration be filed jointly by Radio Relay and Pocket Phone is totally without merit. Our conclusion was merely that Pocket Phone, licensee of KEA777 at the time of the filing of the original petition to deny, was the true party in interest—not Radio Relay, then a mere proposed transferee. Similarly, in the present proceeding it is Pocket Phone and not Radio Relay that has the quantum of interest necessary to seek reconsideration of our action under Section 405 of the Act and Section 1.106(b) of our Rules.[4] However, notwithstanding Pocket Phone's interest, we are unable to accept petitioners' arguments that Pocket Phone, as proposed transferor of Station KEA777, was unable to participate in the earlier states of the proceeding. Consequently, under Section 1.106(b) of our Rules, we find that Pocket Phone has not demonstrated its right to seek reconsideration of our decision. For the same reasons that prompted consideration upon the merits of Radio Relay's petition to deny, we will, however, give full consideration to all of the arguments presented by petitioners.

17. Petitioners have offered no convincing arguments that we erred in finding that NYTELCO's showing of need satisfied the standards set in *Long Island Paging*, *supra*. That decision, while finding that a showing of presumptive need based on lack of service and growing population was insufficient, clearly stated that the burden of showing need could be met by several approaches. Significantly, the court discussed the importance of statistical evidence based on surveys. We see no reason to reverse our decision that NYTELCO's projection of need based, in part, on responses from an extensive survey of businessmen, professionals and householders satisfies the *Long Island Paging* standards.

18. *Associated Telephone Answering Service*, *supra*, is cited by petitioners for the proposition that a hearing is warranted if NYTELCO fails to demonstrate that the existing carriers cannot satisfy all demands for service. Such reliance on a case decided in 1967, long before either the decision in the Docket 16778 rulemaking proceeding or the *Long Island Paging* decision is misplaced. The Commission has long favored competition in the mobile services. In

[4] Eligibility to seek reconsideration of Commission action is based on the same statutory standard of being "adversely affected or aggrieved" as is required to file a petition to deny under Section 309(d)(1) of the Act, or to appeal from Commission decisions to the Court of Appeals under Section 402(b) of the Act. For the same reasons discussed with regard to these sections in paragraph 5 of our order, Radio Relay has not demonstrated the quantum of interest or aggrievement necessary to satisfy the requirements of Section 405 of the Act.

fact, whether to have such competition between wireline and non-wireline carriers was a central issue in the guardband rulemaking proceeding. As we mentioned in our decision, we were concerned in the rulemaking proceeding with preserving competition in light of the inherent advantages that wireline carriers have over the non-wireline carriers. This is why we incorporated safeguards into our rulemaking so that all carriers would have a fair opportunity to compete. In view of the restraints imposed by our order allocating certain guardband frequencies for use by the wireline companies, our chief concern is whether NYTELCO has made an adequate showing of need for their proposed services. As discussed above, we have found that NYTELCO has demonstrated such need in accordance with the standards set in *Long Island Paging*.

19. In reiterating their arguments that NYTELCO's entry into the market would have an adverse effect upon the existing carriers, petitioners ask that we take official notice of the carriers operating in the market as well as their losses or modest profits. Such information has always been a matter of Commission record and adds nothing new to petitioners' arguments. It is also requested that we take official notice of Federal and State summaries of area employment developments and 1971 trends in employment, prices and earnings in the Buffalo area. Petitioners have already argued at length that a "depressed economic condition has plagued the Buffalo area." The addition of documentation (which, perhaps, may have been available in one form or another as long ago as January of 1972 when petitioners were still filing pleadings) of this same claim which was already considered is not a material change. We have not been shown that the economic conditions in Buffalo have lessened the need for one-way paging service, as evidenced by the showings of need presented by NYTELCO and Gerard T. Uht and significantly, by Pocket Phone, in its own application for additional facilities.

20. Petitioners have quoted the Commision as stating in *United Telephone Co. of Ohio, supra*, that a hearing may be warranted because of "concern that there *may* be unfair or illegal competitive practices existing between wireline and non-wireline carriers . . . (emphasis added)" but it is clear that we were not concerned with what *might* occur, in the prospective vein that petitioners fears of a NYTELCO operation have been voiced, but rather with what an analysis of presently existing practices would show. We fully expect, as stated both in our order of May 24, 1972 and in the rulemaking proceeding, that NYTELCO will honor the spirit as well as the letter of the restraining conditions imposed by the order allocating guardband frequencies. Furthermore, we have already considered the cases cited by petitioners dealing with the exclusion of certain large corporations from particular markets and find no reason to reverse our analysis.

21. The arguments presented here by Radio Relay and Pocket Phone regarding alleged service deficiencies by NYTELCO and a Memorandum and Order of the U.S. District Court for the Eastern District of Pennsylvania involving a Philadelphia miscellaneous common carrier are essentially the same as those presented in the original

petition to deny and discussed in our decision. We find no reason for any further discussion of these matters.

22. Finally, we find that petitioners' request that this proceeding be consolidated with others involving Radio Relay protests against Bell System affiliates is without merit. Aside from the fact that such request might have better been made long ago in this proceeding, petitioners have failed to show that a hearing is warranted even for the single application of NYTELCO. Having shown no concrete evidence of anti-competitive practices by Bell affiliates either in the rulemaking proceeding or in this proceeding, this request must be denied.

23. Accordingly, in view of the above, IT IS ORDERED, that the petition for reconsideration and for other affirmation relief of June 26, 1972 by Pocket Phone Broadcast Service, Inc. and Radio Relay Corp. IS HEREBY DISMISSED.

24. IT IS FURTHER ORDERED that the Motion for Stay filed by Pocket Phone Broadcast Service, Inc. and Radio Relay is rendered moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-846

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Request of WEIPPE CABLE TELEVISION CO., INC., FOR SPECIAL TEMPORARY AUTHORITY TO COMMENCE OPERATIONS OF ITS PROPOSED CABLE TELEVISION SYSTEM AT WEIPPE, IDAHO	CSR-203 ID071

MEMORANDUM OPINION AND ORDER

(Adopted September 22, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID AND HOOKS CONCURRING IN THE RESULT; COMMISSIONERS ROBERT E. LEE AND WILEY ABSENT.

1. On August 3, 1972, Weippe Cable Television Company, Inc., proposed operator of a cable television system at Weippe, Idaho, filed a request for special temporary authority to commence operation of its system pending a ruling on the merits of its pending application for a certificate of compliance (CAC-963).

2. Weippe Cable specifically requests authority to provide approximately 75 subscriber homes in a town of 200 persons with seven television signals: KREM-TV (ABC), KXLY-TV (CBS), and KHQ-TV (NBC), all Spokane, Washington, which, until the termination of prior cable service in Weippe on May 17, 1972, were the only signals that Weippe viewers received; KSPS-TV (Educ.), Spokane, Washington; KWSU-TV (Educ.), Pullman, Washington; KLEW-TV (CBS, ABC), Lewiston, Idaho; and KUID-TV (Educ.), Moscow, Idaho. Weippe Cable relies on the Commission's policy against disruption of television service for authority to reinstate carriage of the three Spokane network signals, and on Section 76.57(a)(1) of the Commission's Rules, which requires carriage of all stations which place a Grade B contour over the community of the system, for authority to carry Stations KLEW-TV and KUID-TV; finally, pursuant to Section 76.57(b), which permits systems that, like Weippe Cable, are located outside all markets to carry any number of additional signals, Weippe Cable requests authority to carry Stations KSPS-TV and KWSU-TV.

3. A review of the history of Weippe Cable is useful in evaluating Weippe Cable's request. Prior to May 17, 1972, the date of its termination of operations in Weippe, General Sales and Service Company operated cable television systems at Weippe, Orofino, and Kamiah, Idaho. In part due to the obsolescence of its equipment, which was first installed in 1954, General was hampered in its delivery of cable service to these communities for approximately a year and a half before its termination. During this period, Weippe Cable attempted

to purchase control of General's operations, and General refused. In the course of negotiations, Weippe Cable discovered that General held no franchise from Weippe. On May 2, 1972, Weippe granted an exclusive franchise to Weippe Cable, and General shut down its facilities shortly thereafter. Weippe Cable plans to operate in Weippe with equipment that entirely replaces the plant and machinery used by General. No microwave relay services are necessary for Weippe Cable to deliver television services. Clearwater Cable Television Company, which operates a cable system at Orofino, has agreed to accept responsibility for providing maintenance, repair, and adjustment services to subscribers to the Weippe system.[1]

4. Carriage of all seven signals is consistent with Section 76.57 of the Rules; however, the Commission believes that temporary authority for carriage of only four of these signals should be granted—the three formerly carried Spokane network signals, and the signal of the Idaho educational station, KUID–TV. Carriage of the network signals is warranted by the long-standing Commission policy against curtailing service that had previously been provided. See *Cable Television Report and Order*, FCC 72–108, FCC 2d, at para. 77. With respect to the educational signal, the Commission has encouraged the wide dissemination of such programming to communities whose geographic and cultural isolation makes such programming especially beneficial. It should be noted that, if Weippe Cable is granted a certificate of compliance, carriage of KUID–TV would be obligatory under Section 76.57(a)(1).[2]

In view of the foregoing, the Commission finds a grant of special temporary authority to Weippe Cable Television Company, Inc. would be consistent with the public interest.

Accordingly, IT IS ORDERED, That effective September 22, 1972 Special Temporary Authority IS GRANTED to Weippe Cable Television Company, Inc., to carry the signals of Stations KREM–TV, KXLY–TV, KHQ–TV, and KUID–TV on its cable system at Weippe, Idaho, pending Commission action on its application for certificate of compliance (CAC–963).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] The ownership of the two systems overlaps. Two parties, whose interests when joined together include 70% of the stock of Clearwater, also together own 40% of the voting stock of Weippe Cable. A third party, who owns 2.5% of the voting stock of Clearwater, also owns 20% of the voting stock of Weippe Cable. The two parties who own 70% of Clearwater are also president and secretary-treasurer of Weippe Cable. The party who owns 2.5% of Clearwater's voting stock and 20% of Weippe's voting stock is also vice-president of Weippe Cable. Only the three parties mentioned hold interests in Clearwater stock.

[2] A somewhat similar situation existed in *Tele-Vue Systems, Inc.*, FCC 71–1019, 32 FCC 2d 276, in which temporary authority was granted to permit Tele-Vue to continue relaying five television signals to its cable system at Redding, California, while its CARS applications was pending.

109–010—72——5

F.C.C. 72-845

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH CO. Revision of Tariff F.C.C. No. 254 relating to Advanced Record System Circuit Switching Network Service	Docket No. 19591

MEMORANDUM OPINION AND ORDER

(Adopted September 22, 1972; Released September 25, 1972)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; ROBERT E. LEE AND WILEY ABSENT; COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT.

1. We have under consideration a "Petition of the Administrator of General Services for Suspension and Investigation and for an Accounting Order," filed September 6, 1972, on behalf of the General Services Administration (GSA). In its Petition GSA requests that the Commission suspend and designate for hearing only one of several revised tariff pages of Private Line Tariff F.C.C. No. 254 of The Western Union Telegraph Company which were submitted by Transmittal Letter No. 6781 on August 25, 1972 to become effective September 26, 1972.

2. These revised tariff pages relate to Western Union's tariff offering of a private line service known as the Advanced Record System (ARS). ARS is a communications system designed to handle point to point message transmission throughout the United States. It has been furnished to GSA in its basic form since 1965. The system was built by Western Union pursuant to contract with GSA for the purpose of providing to the civilian agencies of the U.S. Government a single, integrated, record communications service over a completely private dedicated network, the specifications for which are fixed by GSA. ARS does not share either its switching equipment or its line facilities with any other government or commercial system. The system is capable of exchanging traffic with other networks, such as the telephone companies' AUTODIN and Western Union's TELEX and TWX services. There is also provided the capability of re-file of messages to the Western Union Public Message System.

3. Pursuant to the request of GSA, as evidenced by a supplemental contract with Western Union dated September 22, 1970, the carrier has proceeded to add new facilities and equipment to the basic ARS in order to meet the needs of GSA for certain capabilities and characteristics not available in the old ARS. Thus, for example, the enhanced ARS is designed to accommodate terminal equipment operating at 300 bauds, instead of the old 110 bauds and to increase the

number of available subscriber terminations from 2,000 to 3,185. To provide the enhanced ARS, as requested by GSA, the carrier has increased its investment in ARS by adding about $6.6 million in new equipment and facilities to its existing net investment of $4.5 million for a total investment of about $11 million.

4. The revised tariff pages in question offer to provide to GSA the expanded ARS, beginning September 26, 1972. The monthly charges for ARS on that date would be $341,000 contrasted with the present monthly charges of about $106,000. Although GSA apparently wants to utilize the enhanced ARS beginning September 26, 1972, it has asked us to suspend the effectiveness of only the one revised tariff page that sets forth the higher charges but to let the other pages go into effect that offer the improved service. This would mean that GSA, during any period of suspension, would have the benefit of the use of the additional capabilities and characteristics of the improved ARS which the carrier will provide at a new capital outlay of about $6.6 million, without being obliged to pay any increased charges therefor. We agree with Western Union that this would be grossly unfair to it and we shall reject GSA's request that we suspend the revised charges with the improved service going into effect without suspension.

5. GSA appears to recognize that it should pay more for the improved ARS. However, it disagrees with the new monthly charge of $341,000.00 and the new termination charges which the carrier proposes to impose if GSA should terminate the enhanced ARS within 10 years, that is, prior to August 27, 1982. Thus, GSA states, *inter alia*, that the monthly charges are based upon an 18% pre-tax rate of return which GSA claims is excessive particularly since the carrier pays no income tax; that the termination charges are fixed at levels that are designed to reduce the risks of the carrier to zero in providing ARS; and that the amount of such termination charges do not reflect any salvage values which GSA contends should be at least 25%.

6. We believe that GSA has raised sufficient questions concerning the justness and reasonableness of the charges for the enhanced ARS to warrant a hearing under Section 204 of the Act. However, in view of the aforementioned considerations, we do not believe that we should suspend the effectiveness of these revised tariff pages for the full statutory period of 90 days. The carrier apparently is entitled to a higher charge for the improved ARS and GSA apparently wants to obtain the benefits of the enhanced service starting September 26, 1972. Accordingly, we shall suspend all of the revised pages for one day and enter an accounting order providing for possible refunds to GSA if we find the charges to be excessive.

7. In its reply to GSA's petition to suspend, Western Union requests that, if we set this matter for hearing, we order the start of the hearing deferred until after conclusion of the proceedings in Docket 18935, the Autodin Rate case, in which related issues are under litigation. We do not believe that we should issue such order. GSA will be paying substantially higher charges for the enhanced ARS than it is now paying and is entitled to a determination of the lawfulness of the increased charges without undue delay. This does not mean that the parties may not mutually agree upon such postponement, which agreement would be subject to approval of the presiding officer.

8. Accordingly, IT IS ORDERED, That, pursuant to the provisions of Sections 201–205 and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of 5th Revised Page 16, 5th Revised Page 130, 2nd Revised Page 210, 2nd Revised Page 211, 2nd Revised Page 212, 3rd Revised Page 213 and 1st Revised Page 213.1 of The Western Union Telegraph Company Tariff F.C.C. No. 254, and that no amendments thereto may be made during the pendency of this proceeding without prior approval from the Commission.

9. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204, the tariff pages set forth in the above paragraph ARE HEREBY SUSPENDED until September 27, 1972, and that Western Union shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase;

10. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

(1) Whether the charges, classifications, practices and regulations published in the aforesaid tariffs are or will be unjust and unreasonable within the meaning of Sections 201 (b) of the Act;

(2) If any of such charges, classifications, practices and regulations are found to be unlawful, whether the Commission should prescribe charges, classifications, practices and regulations for the service governed by the tariffs, and if so, what should be prescribed.

11. IT IS FURTHER ORDERED, That a hearing be held in this proceeding at the Commission's offices in Washington, D.C., at a time to be specified; and that the Administrative Law Judge to be designated to preside at the hearing shall certify the record, without preparation of an initial or recommended decision, and the Chief of the Common Carrier Bureau shall thereafter issue a recommended decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 CFR 1.282; and

12. IT IS FURTHER ORDERED, That Western Union is made Respondent and that the GSA is permitted to intervene as a party upon written notice within 20 days from the release of the order.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this order by certified mail, return receipt requested, to the General Services Administration and The Western Union Telegraph Company, and shall cause a copy to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-814

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WFMY TELEVISION CORP. (WFMY-TV), GREENSBORO, N.C. For Renewal of Broadcast License	File No. BRCT-69
GREENSBORO TELEVISION CO., GREENSBORO, N.C. For Construction Permit For New Television Broadcast Station	File No. BPCT-4303

MEMORANDUM OPINION AND ORDER

(Adopted September 13, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID ABSENT. COMMISSIONER JOHNSON CONCURRING IN THE RESULT. COMMISSIONER WILEY DISSENTING AND ISSUING A STATEMENT.

1. We have before us for consideration a petition for reconsideration and a motion to stay, filed March 31, 1972, of our action in *WFMY Television Corp.*, 33 FCC 2d 857, 23 RR 2d 1032, released March 2, 1972, in which we denied a "Joint Petition for Approval of Agreement," filed by WFMY Television Corp. (WFMY) and Greensboro Television Company (Greensboro).

2. The joint petition seeks our approval of the dismissal of Greensboro's application in return for WFMY's reimbursement of Greensboro in an amount determined by us to have been legitimately and prudently expended in connection with the preparing, filing and prosecution of Greensboro's application, but not to exceed $44,195. In our prior decision denying the withdrawal agreement, we stated that we had returned to the controlling principle enunciated in the 1963 case of *National Broadcasting Co., Inc.*, 25 RR 67. Thus, where a withdrawal agreement is between a renewal applicant and an applicant for a construction permit, we will not approve the agreement unless it is demonstrated that there are other countervailing public interest considerations or other unique circumstances which would outweigh the detriment to the public which would result from the loss of choice between applicants at a time when the public is receiving service and will continue to do so. In its petition for reconsideration, Greensboro continues to assert that approval of the withdrawal agreement would serve the public interest in that it would eliminate the need for a lengthy comparative hearing which would unnecessarily burden the Commission and WFMY's staff and which might impair the quality of station WFMY-TV's service. As we previously indicated, these considerations, which are primarily directed to the private interest of WFMY and are present in every renewal-new applicant comparative hearing, are not of sufficient weight to offset the detriment to the public interest from the loss of a choice between applicants.

3. Citing our decisions in *National Broadcasting Co., Inc.*, 24 FCC 2d 218, 19 RR 2d 634, released July 7, 1970, and *Post-Newsweek Stations, Florida, Inc.*, 26 FCC 2d 982, 20 RR 2d 730, released November 16, 1970, in which we waived the policy set forth in the 1963 *National Broadcasting Co., Inc.*, case, *supra*, and approved withdrawal agreements, which arose under unique circumstances, Greensboro reiterates its contention that its request for withdrawal of its application and reimbursement of its expenses also arose out of unique circumstances. Since we set forth Greensboro's allegations in this regard at considerable length in our prior decision, we shall not do so again. The short answer to Greensboro's assertions is that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Citizens Communications Center* v. *F.C.C.*, 145 U.S. 32, 447 F. 2d 1201, decided June 11, 1971, which invalidated our 1970 *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424, (1970) requires us to comply with the full comparative hearing requirements of section 309(e) of the Communications Act of 1934, as amended, and the decision in *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945). Therefore, should Greensboro elect to prosecute its application, it will be afforded a full comparative hearing and, thus, an opportunity to present evidence as to why its application should be preferred. We recognize that uncertainty exists in the renewal-new applicant area, and we indicated in our prior decision that:

> We do not now hold that this area is now definitively settled in all respects. Clearly it is not, as evidenced not only by the issues raised by the Court's decision in *Citizens Communications Center*, but also those in the *Further Notice of Inquiry*, in Docket No. 19154, 31 FCC 2d 443, released August 20, 1971. It may be a considerable period of time before all significant aspects of policy in this field are definitively settled. Indeed, it may be completely settled only with the issuance of a series of decisions over a period of some years. That being the case, the crucial question now is whether we should follow the 1963 *National Broadcasting Co., Inc.*, case at this time. We think the answer is clearly adherence to that basic decision.[1]

In our recent decision, *Times and News Publishing Company*, 24 RR 2d 462, released May 30, 1972, in which we denied approval of a withdrawal agreement between a renewal applicant and a competing applicant, we restated our view that the policy embodied in the 1963 *National Broadcasting Co., Inc.*, case, *supra*, serves the public interest, the touchstone of Commission action. Finally, we note that Greensboro's reliance on the decision of the United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of The United Church of Christ* v. *F.C.C.*, case No. 24,672 — U.S. App. D.C. —, — F 2d —, 24 RR 2d 2001, decided March 28, 1972, as support for approval of its reimbursement agreement is misplaced. That decision involved a request for reimbursement of expenses in a petition to deny situation in which approval of the withdrawal agreement resulted in manifest public interest benefits with no detriment to the public inter-

[1] *WFMY Television Corp.*, 33 FCC 2d 857, 860; 23 RR 2d 1032, 1035.

est.[2] However, in the case now before us, we are unable to find that public interest benefits would flow from approval of the reimbursement agreement, while it is clear that there would be the detriment of loss of choice. In this regard, we note that Greensboro's assertion that the quality of station WFMY–TV's performance had substantially increased subsequent to the filing of Greensboro's competing application is unsupported, and thus, it cannot form the basis for a determination that public interest benefits would result from approval of the withdrawal agreement.

4. For the reasons we have set forth, we must affirm our original decision denying the joint petition for approval of agreement. Consequently, the petition to stay will be dismissed as moot. Consistent with paragraph 10 of our prior decision, we shall provide that prior to our designating the above-captioned applications for comparative hearing, we will require Greensboro to file a statement as to whether it intends to participate in further proceedings before the Commission.

5. IT IS ORDERED, That the petition for reconsideration filed by Greensboro Television Company IS DENIED, our prior decision in this matter IS REAFFIRMED, and the petition to stay IS DISMISSED.

6. IT IS FURTHER ORDERED, That unless Greensboro Television Company, within thirty (30) days of the release of this Order, files a statement evidencing its intent to participate in further proceedings before the Commission, its application will be dismissed for failure to prosecute pursuant to section 1.568(b) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER RICHARD E. WILEY

I dissent to the Commission's decision today, as I did to the majority's earlier action denying the joint request for approval of agreement, because I believe the unique circumstances and confusion of our policy surrounding the filing of the application in question warrant approval of the withdrawal and reimbursement agreement. Although I recognize a need to revert to our general 1963 policy of refusing to approve such agreements where they cause the Commission to lose an opportunity to choose between two potential licensees, I believe that, in all fairness, this particular request should be granted.

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[2] In this connection, the Court stated:
"In permitting the Texarkana groups to withdraw their petition, the Commission cited . . . public benefits and mentioned no specific detriment to the public interest." [33]
[33] Indeed, when a public group rather than a private competitor petitions to deny a local license, withdrawal of that petition entails no "loss of choice" since the group offers no alternative licensee. *Office of Communication of The United Church of Christ* v. *F.C.C., supra*, 24 RR 2d 2001, 2012.

F.C.C. 72R–255

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH–6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, D.B.A. HILTON, McGOWAN & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH–6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT, D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH–7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted September 15, 1972; Released September 20, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the mutually exclusive applications of WIOO, Inc. (WIOO), Hilton, McGowan & Hilton (Hilton) and Cumberland Broadcasting Company (Cumberland) for a new FM broadcast station at Carlisle, Pennsylvania. The Commission, by Order, FCC 72–233, 37 FR 6519, published March 30, 1972, designated these applications [1] for consolidated hearing on various issues. Presently before the Review Board are three petitions to enlarge issues, filed April 14, 1972, April 19, 1972, and April 26, 1972, by WIOO which seek issues relating to: (a) Hilton's compliance with the Commission's public file requirements and site availability; and (b) Cumberland's compliance with the Commission's public file requirements, its financial proposal, and a related 1.65 issue.[2]

[1] A fourth application, filed by Russel C. Lash (Docket No. 19470, File No. BPH–6864), was also designated for hearing but was later dismissed by the Hearing Examiner by Order, FCC 72M–570, released May 1, 1972.

[2] Also before the Review Board are the following related pleadings: (a) opposition, filed May 10, 1972, by Hilton; (b) opposition, filed May 15, 1972, by Cumberland; (c) Broadcast Bureau's comments, filed May 15, 1972; (d) reply to (b), filed May 23, 1972, by WIOO; (e) Broadcast Bureau's supplement to (c), filed June 22, 1972; (f) supplement to petition to enlarge issues, filed July 14, 1972, by WIOO; (g) second supplement to petition to enlarge issues, filed July 19, 1972, by WIOO; (h) motion to strike, filed July 27, 1972, by Cumberland; (i) third supplement to petition to enlarge issues, filed August 7, 1972, by WIOO; (j) opposition to (h), filed August 7, 1972, by WIOO; (k) opposition to (f), (g) and (i), filed August 9, 1972, by Cumberland; (l) reply to (k), filed August 17, 1972, by WIOO; (m) reply to (j), filed August 17, 1972, by Cumberland; (n) opposition to (i), filed August 28, 1972, by Cumberland; (o) reply to (n), filed September 8, 1972, by WIOO. Although the Board will accept the supplements and deny the motion to strike (see footnote 7, *infra*), we note that we do not look with favor on such multiple filings, and that parties who engage in such filings do so at their own risk.

AVAILABILITY OF PUBLIC FILES ISSUE AGAINST HILTON

2. Petitioner initially requests issues to determine whether Hilton has complied with Sections 1.580 and 1.594 [3] of the Commission's Rules and whether Hilton has "misrepresented" the place where its public file is available. In support, WIOO has supplied an affidavit from its attorney, averring that on March 27, 1972, he personally visited the specified location where Hilton's application was to be kept and was told that the application had been removed from that location about one year prior to his visit. Unverified letters from Harold Swidler, president of WIOO, are also submitted which state that the Hilton application was not at its specified location on March 30, 1972, or April 4, 1972.

3. In opposition, Hilton submits an affidavit of Howard J. Hilton, a partner in the applicant, which indicates that the application was available from February, 1969, until the "fall of 1971." At that time, affiant states, the file was removed for a period of approximately six months in order that a partner who had been out of the country could examine it. Hilton contends that its actions were reasonable because: (a) nobody had requested to see the file in over two and one-half years; (b) Hilton was unaware of the requirement that an additional notice be published when the application is designated for hearing (Section 1.594); (c) Hilton instructed the person responsible for making the file available to the public to notify him if a request were to be received; (d) Hilton further stated that, if such a request were received, he would personally deliver it; and (e) no member of the public nor any party to this proceeding was inconvenienced or prejudiced by the removal of the file.

4. In view of the affidavits submitted by WIOO and Hilton it appears to the Review Board that the application of Hilton was not available for inspection at the site specified by it in its notices of publication for approximately six months and, therefore, appropriate issues must be added.[4] Hilton has conceded in its opposition affidavit that its public file was not present in the specified location for a period of approximately six months and part of this time was during the critical period after its application was designated for hearing. The Board is in agreement with the Broadcast Bureau's comments, however, that the issue should be framed in terms of Hilton's compliance with Section 1.526,[5] rather than Sections 1.580 and 1.594. These latter sections more directly deal with notice by local publication, whereas the allegations in the present petitions principally involve the *maintenance* of the public file and, therefore, Section 1.526. Thus, Hilton's

[3] Sections 1.580 and 1.594 require that an applicant publish a local notice indicating, respectively, that an application is on file with the Commission and that the Commission has established a hearing date. Such sections also require that the notice state a local address where the application and related material will be available for public inspection.

[4] As a preliminary matter, the Board notes that WIOO concedes that its second petition to enlarge was filed five days late as determined by Section 1.229(b) and that its third petition to enlarge was filed seven days after the second petition. The Board will, however, consider both petitions because the second petition raises substantial public interest questions. *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966), and the third petition was filed within a week after WIOO became aware of the facts which give rise to the allegations in the petition.

[5] Section 1.526 requires that all applicants for new broadcast facilities must maintain a local file containing the application and all related material for public inspection.

admitted violation of Section 1.526 requires addition of the issue and neither the allegations that the public file is infrequently utilized, nor that the applicant was unaware of Commission requirements, nor that petitioner has not been prejudiced obviates the need for the specified inquiry. See *North American Broadcasting Company, Inc.*, 15 FCC 2d 984, 15 RR 2d 367 (1969); *Jacksonville Broadcasting Company*, 26 FCC 2d 929, 20 RR 2d 626 (1970); and *Edward G. Atsinger, III*, 29 FCC 2d 443, 21 RR 2d 1039 (1971). The Board does not believe, however, that the allegations raise a substantial question of misrepresentation and therefore no misrepresentation issue will be specified. However, all relevant inquiries regarding the conduct in question may be pursued under the issue as specified.

AVAILABILITY OF PUBLIC FILES ISSUE AGAINST CUMBERLAND

5. Petition next requests an issue to inquire into Cumberland's compliance with Section 1.526 of the Commission's Rules and the effect thereof on Cumberland's comparative qualifications, and an issue to inquire into the alleged refusal of Cumberland to make its public file available for inspection on April 19, 1972. In support, petitioner supplies two affidavits. The first is from petitioner's attorney, who avers that on March 27, 1972, he and Swidler went to the specified public file location and asked to see the public file. Mr. Contract (a Cumberland principal) handed a folder to him, and upon inspection the attorney "found it consisted solely of a letter of transmittal to the Commission dated March 2, 1971, and all of the application filed on that date." The attorney then avers that approximately three hours later he was in the office of Mr. Swidler when Swidler received a telephone call from Mr. Contract advising him that the file was not complete, and that Contract's wife had just informed him that there was other material and they were invited to inspect it. The second affidavit is that of John P. Hall and Ray Quigley, both of whom aver that "Mr. Contract denied Mr. Hall the opportunity to . . . examine said documents . . ." on April 19, 1972. The Broadcast Bureau, in its comments, expresses the view that, unless an adequate explanation is made in Cumberland's responsive pleading, enlargement of the issues is required by these affidavits.

6. In opposition, Cumberland submits the affidavits of Alexander Contract and Sylvia Contract, both of which are in substantial agreement with the affidavit of petitioner's attorney. As to the Hall and Quigley affidavit, however, Alexander Contract avers that Mr. Hall, who has a history of trouble with Mr. Contract,[6] addressed Mr. Contract in a "belligerent and abrasive manner" and was therefore asked to leave. Mr. Contract goes on to state that there was "no mention by either Mr. Hall or Mr. Quigley regarding the public inspection file." On the basis of the above, Cumberland argues that a Section 1.526 issue is not needed because: (a) corrective action was taken to include

[6] Affidavits by Mr. Contract and his local attorney are submitted by Cumberland for the purpose of showing a series of incidents which allegedly explain the reason that Mr. Hall was asked to leave the premises on the occasion in question. These affidavits state that Mr. Hall had been instructed by both the Justice of the Peace and his attorney to avoid confrontations with Mr. Contract, due to a series of altercations, at least one of which resulted in a fist fight.

all relevant material in the public file immediately after the attorney's March 27, 1972 visit; (b) Mr. Swidler and his attorney were advised soon after their visit to inspect the public file that the amendments were then available; (c) no claim of prejudice has been made; and (d) no violation of Section 1.526 occurred with respect to the visit by Hall and Quigley because neither asked to see the file.

7. The Review Board is of the opinion that neither of the requested issues relating to the availability of Cumberland's public files is warranted. In reference to the March 27, 1972 visit by petitioner's attorney, due to the immediate corrective action taken by Contract, no injury or prejudice to the parties or public has resulted. As shown by petitioner's affidavit, the complete file was available no more than three hours after petitioner's visit and petitioner was so informed. Furthermore, it appears that the omissions were minor in nature because the completed application as well as much of the later related material was contained in the file handed to petitioner's attorney. Finally, Contract's claim of inadvertence is neither challenged nor unreasonable and no purpose would be served by further inquiry into this matter on the basis of the present allegations. *Media, Inc.*, 22 FCC 2d 875, 18 RR 1175 (1970). As for the affidavit of Hall and Quigley, the Board believes that in view of affidavits of Contract and his attorney detailing the hostile relationship between Contract and Hall and because Hall had been instructed by both the Justice of the Peace and his attorney to avoid confrontations with Contract, it was not unreasonable for Contract to ask Hall to leave the premises. In this regard the Board notes the sworn uncontradicted allegation of Contract that Hall's attitude was "belligerent and abrasive." In view of all the circumstances, the Board is of the opinion that no issue is warranted as to the availability of Cumberland's public file.

SITE AVAILABILITY ISSUE AGAINST HILTON

8. Petitioner requests a site availability issue and a related Rule 1.65 issue against Hilton. In support, petitioner supplies the affidavit of Harold Swidler, president of WIOO, who avers that he "drove to, and checked" Hilton's proposed site and learned that when Hilton's "six-month option" expired the property was sold to a different party. Swidler avers that he spoke with the new owner, who told Swidler that he was building on the property and "was not interested" in selling to Hilton.

9. In opposition, Hilton argues that petitioner's request is fully rebutted by an attached affidavit of Howard J. Hilton, a partner in the applicant, and amendments to the Hilton application on file with the Commission. Hilton avers that the option on the land mentioned in Swidler's affidavit did, in fact, expire but that soon thereafter Hilmac United Corporation, Hilton's predecessor as an applicant, purchased "twenty acres of land next to the parcel specified in the option . . .". Furthermore, notes Hilton, Hilmac United has agreed to lease the land to the applicant, as reported to the Commission in an amendment to the application filed on July 28, 1970. Hilton also declares that, after discussion with their consulting engineer, it was their belief that the slight shift in location would require only that

the geographical coordinates specified in the application be changed. Subsequently, notes Hilton, in an amendment to its application dated January 24, 1970, and filed with the Commission on January 26, 1970, Hilmac United informed the Commission that its costs for acquiring land would be reduced to $3,200, that the applicant's studio would not be located at the transmitter site, and that the North Latitude coordinate for the site specified in the original application should be changed by six seconds. The Broadcast Bureau also opposes the requested issues on the basis that the "request was grounded solely on a hearsay affidavit," citing *Augusta Telecasters, Inc.*, 10 FCC 2d 594, 11 RR 2d 625 (1967).

10. The Review Board will deny the requested site availability issue and related Rule 1.65 issue against Hilton. Initially, the Board is in agreement with the Broadcast Bureau that the subject request does not comport with the requirements of Rule 1.229. Petitioner's request is, in fact, grounded solely on a hearsay affidavit and no explanation has been offered as to why an affidavit from the owner of the property was not submitted. *Augusta Telecasters, Inc., supra.* We have, however, examined the merits of petitioner's request and find these to be inadequate. As shown by Hilton's opposition and related previous amendments, a site is presently available to that applicant and the Commission has been advised of its plans for a transmitter site as required by Rule 1.65.

FINANCIAL ISSUES AGAINST CUMBERLAND

11. On April 14, 1972, petitioner requested the addition of four issues to inquire into the availability of certain loans relied upon by Cumberland and the terms thereof, as well as a related Rule 1.65 issue. However, the Hearing Examiner has recently accepted an amendment (FCC 72M–832, released June 27, 1972) by Cumberland which totally restructures its financial proposal. This amendment establishes a new financial plan which substitutes a $75,000 loan commitment from Mr. Henry Marshall for the previous commitments, reduces the amount of existing capital available from $19,000 to $4,500, and provides that $63,000 is available from the proposed sale of property. Cumberland proposes first-year operating and construction costs of $108,545 and the amendment purports to establish Cumberland's financial ability to meet this requirement from liquid assets totaling $142,500. This amendment therefore moots the issues requested by petitioner on April 14, 1972, which deal with the availability of loans to Cumberland and terms thereof.

12. In response to the above described Cumberland amendment WIOO has filed three supplemental petitions which challenge both the value of the property proposed for sale by Cumberland and Mr. Marshall's intention to in fact make the $75,000 loan. In support thereof, petitioner submits an affidavit of Harold Swidler in which Mr. Swidler avers that he met with Mr. Marshall and it was Swidler's "impression" that the letter of commitment to the Contracts was only a "favor to a friend" and that Mr. Marshall intended to review the Contracts' financial position prior to actually making the loan in question. Petitioner also attacks Mr. Marshall's commitment on the grounds that

"it makes no sense" to agree to a loan for operation of an FM-only station without collateral and payable over a period of years with no payment during the first 13 months. Petitioner also challenges that part of Cumberland's financial proposal which relates to the sale of certain real estate, arguing first that such property is not a liquid asset because there is no offer from a qualified buyer, and, second, that the market value of the property in question is approximately one-half that shown in Cumberland's amendment. In support of this latter contention, WIOO has supplied sworn appraisals by four local realtors whose estimates of the value of the property in question range from $33,000 to $36,000.[7]

13. In opposition,[8] Cumberland submits the affidavit of Henry Marshall, dated July 11, 1972, in which he states that he has no "reservation or equivocation with respect to the loan commitment" and that the "loan commitment stands as made." In reference to the appraisals supplied by WIOO, Cumberland argues that the realtors involved did not have "personal knowledge" because of the appraisers' failure to take account of "substantial capital improvements" and resulting increases in rental from the property. Cumberland also supplies an affidavit from the Contracts which states that a smaller property in the same block recently sold for $165,000 and gives a detailed description of the recent capital improvements made to the structure in question.

14. The Review Board will add a limited financial issue. Petitioner has supplied four affidavits from local area realtors, each of which estimate the fair market value of the property in question to be less than $36,000 before encumbrances. This represents a $50,000 difference from the figures supplied by Cumberland's appraisers and, if substantially correct, would indicate that Cumberland's financial proposal falls far short of meeting the currently estimated expenses. Moreover, three of the four affidavits clearly indicate that the appraiser made a recent and personal inspection of the property, thereby rebutting Cumberland's contention that the appraisers lacked personal knowledge of the premises. Thus, in view of the size of the discrepancy among the various appraisers, the Board believes that the current value is in doubt and therefore inquiry at hearing of all matters pertinent to such value is appropriate.[9] The Board does not, however, believe that petitioner has supplied sufficient allegations at the present time to inquire into the motives behind Mr. Marshall's loan commit-

[7] By affidavit dated July 21, 1972, the Notary Public who notarized these affidavits withdrew her notarization after learning that at least one of the notarizations was unauthorized. WIOO subsequently submitted new notarizations of these appraisals and because of the serious questions raised the Board believes it necessary to consider the substance of these appraisals. It should also be noted that inquiry as to the circumstances surrounding the allegedly unauthorized notarizations is being sought in a separate request for enlargement which is presently pending before the Board.

[8] In response to these supplemental petitions, see footnote 2, *supra*, Cumberland has filed a motion to strike, as well as an opposition. The motion to strike argues that WIOO's "supplements" are unauthorized, untimely, hearsay and cumulative. Because the supplements are in response to an amendment attempting to cure Cumberland's previously challenged financial proposal and because such supplements raise substantial questions concerning Cumberland's financial proposal, the Board will deny Cumberland's motion to strike.

[9] It is to be further noted that the amount of the discrepancy is indeed substantial ($50,000), and the Board does not believe that sufficient information is present in order to make a qualified examination of this issue. In this regard the affidavits contain cursory comments on the appropriateness of using various methods of evaluation, such as current market values, income approach and replacement value. In sum, the Board believes this matter would be better examined during hearing.

ment. The allegations in no way indicate either that Mr. Marshall does not have sufficient assets to make the loan or that Mr. Marshall does not intend to honor his commitment. Mr. Swidler's "impression" that the loan commitment was given only as a "favor" is clearly rebutted by Mr. Marshall's current affidavit in which he reiterates his commitment and avers "every intention of providing the loan as previously indicated and [I] possess the resources to carry it through." Thus, petitioner's belief that the loan "makes no sense" is simply inadequate to add that portion of the requested issue.

15. In reference to the requested Rule 1.65 issue,[10] petitioner charges that: (a) Cumberland relies upon a loan of $50,000 in principal amount from the Farmers Trust Company, as evidenced by a letter dated March 1, 1971, and filed as an amendment to Cumberland's application on May 27, 1971, and yet it appears from an attached affidavit of petitioner's attorney that, subsequent to the letter of March 1, 1971, but before the amendment was filed on May 27, 1971, the applicant had received two superseding letters from the bank which have not been reported; (b) Cumberland's balance sheet does not set forth the amounts payable within the next 12-month period as a current liability on various mortgages payable; (c) Cumberland's balance sheet does not reflect an additional mortgage in the amount of $6,500 entered into on December 23, 1971; (d) Cumberland has not amended the balance sheet of its principals to reflect a mortgage note executed on January 18, 1971; (e) Cumberland's application failed to disclose the existence of two judgments against its principals totaling in excess of $32,000; (f) a Mr. James Line, who originally agreed to lend Cumberland $30,000 "has advised Cumberland that he no longer intends to fulfill his commitment to it"; and (g) Donald C. Hartman has agreed to lend Cumberland $20,000 without security or interest for a period of four years and yet there is no indication as to why Mr. Hartman is "so generous."

16. Both Cumberland and the Broadcast Bureau oppose addition of the requested Rule 1.65 issue. The Broadcast Bureau opposes addition of the issue primarily because of the "speculative and hearsay nature" of petitioner's allegations, urging that such allegations do not comply with Commission Rule 1.229. Substantively, Cumberland submits various affidavits in explanation of petitioner's allegations. In reference to the bank loan, Cumberland states that the Farmers Trust Company loan of $50,000 remained in effect until April 7, 1972. Furthermore, notes Cumberland, initially a loan in the amount of $30,000 was to be obtained from another party and when such loan "did not materialize" Farmers Trust was requested to increase its loan commitment to $80,000, which it did by letter of May 5, 1971. Later, explains Cumberland, after the loan had been obtained from Mr. Line, Cumberland elected to stand on the March 1, 1971 letter and "to have amended and created the impression that Cumberland relied on $80,000 from Farmers Trust would have been fraud." Cumberland also avers that the above details all correspondence between the bank and Cum-

[10] The Board notes that the allegations supporting the requested Rule 1.65 issue relate to Cumberland's unamended financial proposal. While this showing is no longer relevant to that applicant's financial qualifications, the details will be considered to the extent necessary to determine whether a Rule 1.65 issue is warranted.

berland during the period in question. Cumberland also urges that petitioner's references to "unreported" judgments and mortgages are based on petitioner's misunderstanding of Pennsylvania law and Cumberland's balance sheet. In support thereof, Cumberland submits an Opinion of Counsel indicating that under Pennsylvania law, loans are often accompanied by signed, confessed judgments which are recorded by the lender and are nothing more than recordations to protect the lender when the loan is made. Therefore, argues Cumberland, there are no judgments extant against the principals of Cumberland. Further, Cumberland supplies a "classification" by its accountant explaining where the loans in question appear on the balance sheet and noting that all payments are presently current. In reference to the January 18, 1971 mortgage, Cumberland notes that the mortgage is current and is clearly indicated in its balance sheet. In reference to the loan commitment from James Line, Cumberland submits Line's affidavit, in which he avers that he did not communicate to Cumberland his withdrawal of the loan commitment until April 6, 1972. Also submitted by Cumberland is a letter from Donald C. Hartman dated April 18, 1972, which indicates that there had been no prior notice of the withdrawal of his loan commitment. In reply, petitioner contends that the withdrawal of the loan commitments from Farmers Trust, James Line, and Donald Hartman were not properly reported and therefore the requested issue must be added.

17. The Review Board is of the opinion that the requested Rule 1.65 is not warranted. In reference to petitioner's criticisms of Cumberland's balance sheet we have reviewed the contents thereof and believe all current obligations are adequately and fairly set forth. Further, we have no reasons to doubt the undisputed Opinion of Counsel that the Cumberland "judgments" are current, are in accordance with customary lending procedures in Pennsylvania, and "certainly should not be regarded as adverse legal proceedings for the collection of debts." [11] Finally, Cumberland has supplied uncontroverted affidavits revealing that Cumberland was, at most, nine days late with respect to reporting the withdrawal of a previous loan, which, we believe, constitutes substantial compliance with the requirements of Rule 1.65. *Harvit Broadcasting Corp.*, 32 FCC 2d 656, 23 RR 2d 328 (1971). Thus, Cumberland has, to our satisfaction, adequately answered the petitioner's allegations, and we find no need for further exploration of this matter at the hearing.

18. ACCORDINGLY, IT IS ORDERED, That the petitions for enlargement of issues, filed April 14, 1972, April 19, 1972, and April 26, 1972, by WIOO, Inc., ARE GRANTED to the extent indicated below, and ARE DENIED in all other respects; and the motion to strike, filed July 27, 1972, by Cumberland Broadcasting Company IS DENIED.

19. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

1. To determine whether Hilton, McGowan & Hilton has complied with Section 1.526 of the Commission's Rules, and if not, the effect thereof upon the

[11] Indeed, this interpretation comports with the explanation which petitioner's principals proffered to the Board at an earlier stage of this proceeding. See *WIOO, Inc.*, FCC 72R–231, released August 22, 1972.

applicant's basic or comparative qualifications to be a Commission licensee; and

2. (a) To determine the current marketability and a reasonable fair market value of the property proposed for sale by Alexander Contract and Sylvia Contract d/b as Cumberland Broadcasting Company;

(b) To determine whether, in light of the evidence adduced pursuant to subpart (a) of this issue, Cumberland Broadcasting Company is financially qualified.

20. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under issue 1. added herein SHALL BE upon WIOO, Inc. and the burden of proof under the issue SHALL BE upon Hilton, McGowan & Hilton; and the burdens of proceeding and proof under issue 2. SHALL BE on Cumberland Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*